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Supreme Court, U.S.
FILED

No. 10-901 JAN 10 2011

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In The

Supreme Court Of The United States

CLAUDIA SEGER-THOMSCHITZ,
Petitioner

v.

MUSEUM OF FINE ARTS, BOSTON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On June 30, 2009 at the close of the Prague Holocaust Era Assets Conference, the U.S. and 46 other "stakeholder" nations promulgated the "Terezin Declaration" (Declaration), a purposefully "non-binding" executive agreement prescribing how they would handle claims for the recovery of Nazi-confiscated assets. The stakeholders agreed "to make certain" that their individual national "legal systems" resolved claims for the recovery of Nazi-confiscated artworks "based on the facts and merits of the claim," and that "Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art." The Declaration explicitly augmented a similar predecessor agreement in 1998 (the Washington Principles) by which at the instigation of the U.S. Government 44 nations undertook to decide claims for the recovery of Nazi-confiscated artworks in merely a "just and fair" manner.

1. Does U.S. foreign policy that claims for the recovery of Nazi-confiscated artworks be resolved upon their substantive merits as expressed in the Declaration preempt—under the Supremacy Clause of the U.S. Constitution—state prescriptive periods governing the recovery of movable personal property within their borders that obstruct this objective when these periods reflect an exercise of the "'traditional competence'" of the several states within the meaning of *American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11 (2003)?

2. Does the foreign policy commitment of the U.S. Government in the Declaration to "make certain" that its discrete national "legal system" resolves claims for the recovery of Nazi-confiscated artworks on their substantive merits (which policy enjoys the express approval of *both* Congress and the President) obligate the Federal Judiciary—as a coordinate branch of the U.S. Government—to implement this goal through federal common law if necessary?

3. Does the identity of the Respondent as a federal tax-exempt institution under 26 USCA § 501(c)(3) as well as a public trustee—accountable as a matter of law to U.S. public policy—amplify the need to ensure that judicial claims brought against it to recover Nazi-confiscated artworks are resolved on their substantive merits as U.S. foreign policy and the Declaration prescribe?

LIST OF PARTIES

Petitioner Claudia Seger-Thomschitz (S-T) is an individual residing in Vienna, Austria.

Respondent Museum of Fine Arts, Boston ("Museum or "MFA") is a charitable not-for-profit corporation organized and existing under the laws of the state of Massachusetts and is a federal tax-exempt institution under 26 USCA § 501(c)(3).

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OPINIONS AND ORDERS BELOW

The First Circuit's October 14, 2010 Opinion affirming the ruling of the District Court that federal law and policy favoring the return to rightful owners of Nazi-confiscated artworks did not preempt a Massachusetts statute of limitation that time-barred the claim of Petitioner to recover a Nazi-confiscated painting is reported at 623 F.3d 1 (1st Cir. 2010). The ruling of the District Court is reported at 2009 WL 6506658 (D. Mass. June 12, 2009).

BASIS FOR JURISDICTION

The order of the First Circuit Court of Appeals was entered on October 14, 2010. The petition for certiorari was filed within ninety days from that date. The jurisdiction of this Court is invoked under 28 USCA § 1254(1).

The District Court and the Court of Appeals had jurisdiction under 28 USCA § 1332, in that the petitioner is a foreign citizen, the respondent is a citizen of the State of Massachusetts, and the value of the painting in controversy exceeds $75,000. The Court of Appeals had jurisdiction to entertain the appeal under 28 USCA § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI Clause 2 of the Constitution of the United States (Supremacy Clause)

The Holocaust Victims Redress Act, Public Law No. 105-158, 112 Stat. 15 (1998)

26 USCA § 501(c)(3)
26 CFR § 1.501(c)(3)-1(c)
Mass. Gen. Laws Ann. Ch. 260 § 2A (1948)

STATEMENT OF THE CASE

A. U.S. Policy to Restitute Nazi-Confiscated Artworks Began During World War II

U.S. foreign policy to return Nazi-confiscated artworks to rightful owners began on January 5, 1943 when the 18 Allied governments issued the "Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control," also known as "London Declaration." The London Declaration reserved the right of the Allied governments to invalidate transfers of property by victims of persecution occurring within Nazi Germany and occupied countries "even when they purport to be voluntarily effected."[1]

Immediately after the War the U.S. and Allied authorities sought to return to Nazi victims and their heirs artworks and other property lost in coercive transfers during the years 1933-1945. U.S. restitution policy became crystallized in 1947 with Military Government Law Number 59 (MGL No. 59), which nullified transfers of personal property by victims of Nazi persecution and became the centerpiece of post-War and Allied restitution policy. *See Schoeps v. Museum of Modern Art et al.*, 594 F. Supp.2d 461, 466 (S.D.N.Y. 2009).

U.S. foreign policy in this regard extended to judicial actions brought in U.S. courts. *See Bernstein v. N.V. Neerlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d. Cir. 1954), following a State Department directive to entertain a

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[1] Elizabeth Simpson, *The Spoils of War, World War II and its Aftermath: The Loss, Reappearance and Recovery of Cultural Property*, (1997 Times Mirror Company) at 287.

judicial claim to recover property lost in a "forced transfer."

In 1946 and again in 1951 the U.S. Government—through the "Roberts Commission" and the State Department—formally admonished U.S. museums to take precautions against acquiring Nazi-confiscated artworks coming into the market and that good title to these materials never could be acquired.[2]

B. In the Early 1990's—Following the Collapse of the "Iron Curtain"—Restoring Nazi-Confiscated Artworks to Holocaust Victims Again Became Viable, Sparking a Renewed U.S. Initiative Which Gained International Momentum

As U.S. Ambassador J. Christian Kennedy explained, the Cold War forestalled restoring Nazi-confiscated artworks to Holocaust victims and their heirs.[3] U.S. Ambassador Stuart Eizenstat related that the London Conference for Nazi Gold in 1997 provided an opportunity to reintroduce this subject into international diplomacy and to set the stage for a conference in Washington D.C. (Washington Conference) the following year. [4]

In February 1998, the House Banking Committee under Chairman James Leach held

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[2] Brief of Appellant at pages 24-25; Answer and Counterclaim at par. 107.

[3] J. Christian Kennedy, Special Envoy for Holocaust Issues, United States Department of State, *The Role of the United States in Art Restitution*, Remarks at Potsdam, Germany, April 23, 2007 ("Potsdam Remarks").

[4] Stuart Eizenstat, *Imperfect Justice* (Public Affairs, New York 2004) at 191.

hearings on Nazi-confiscated art. Leach pressed representatives of the Association of Art Museum Directors—with about 170 members—to develop formal guidelines for handling Nazi-confiscated artworks.[5] The guidelines prescribed that museums would resolve claims for the recovery of such artworks in "an equitable, appropriate and mutually agreeable manner."[6] The U.S. hoped to persuade the nations attending the Washington Conference to adopt these guidelines.[7]

C. In 1998 the U.S. Congress Enacted Three Statutes to Help Holocaust Victims and Their Heirs Recover Nazi-Confiscated Artworks and Other Assets

In 1998 Congress enacted three statutes to help victims of Nazi persecution and their heirs locate and recover artworks and other property wrongfully confiscated during the years 1933-1945: (1) the Holocaust Victims Redress Act (Redress Act), Public Law. No. 105-158, 112 Stat. 15 (1998); (2) the Nazi War Crimes Disclosure Act (Disclosure Act) Public Law No. 105-567, 114 Stat. 2865 (1998), and; (3) the Holocaust Assets Commission Act of 1998 (Commission Act), Public Law No. 105-186 (1998). These statutes formally declare U.S. policy to return Nazi-confiscated artworks and other property to rightful owners and allocate five million dollars ($5,000,000) for this purpose. Appendix [A] at 51-52.

Section 201(2) of the Redress Act characterizes Nazi Germany's systematic persecution of Jews during the years 1933-1945 as part of World War II,

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[5] *Id.* at 192.

[6] *Id.* at 193.

[7] *Id.* at 193.

and prescribes that the principles of international law that require that artworks pillaged in war be returned to rightful owners should govern claims to recover Nazi-confiscated artworks. Section 202 declares that "(i)t is the sense of Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner." A at 35. The Redress Act also appropriated to the President $5,000,000 "to assist in the restitution of assets looted or extorted from victims of the Holocaust..." (§ 103). U.S. courts consistently have acknowledged that the Redress Act declares a compelling Congressional policy to return Nazi-confiscated artworks to rightful owners. *See, e.g., Adler v. Taylor*, 2005 WL 4648511 at 1 (C.D. Cal. 2005), *aff'd Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 806 n.2 (N.D. Ohio 2006); *Dunbar v. Seger-Thomschitz*, 638 F. Supp.2d 659, 664 (E.D. La. 2009), *aff'd* 615 F.3d 574 (5th Cir. 2010).

D. Late in 1998 the Executive Branch—Consonant with the Injunction of the Redress Act That All Nations Should Facilitate the Return of Nazi-Confiscated Artworks—Hosted the Washington Conference on Holocaust-Era Assets to Promote this Objective

In November 1998, "the Department of State convened the Washington Conference on Nazi looted

assets. Representatives of 44 countries attended."[8] The declared purpose of the Washington Conference was to find how the 44 participating countries could return Nazi-confiscated artworks to rightful owners. U.S. Secretary of State Madeleine K. Albright proclaimed: "[w]e're here to chart a course for finishing the job of returning or providing compensation for stolen Holocaust assets to survivors and the families of Holocaust victims."[9] She stressed the "moral imperative" to "develop specific principles and identify best practices for art"[10] and for "the return of property."[11]

E. While the U.S. Delegation Sought a Formal, Binding International Legal Agreement on Specific Principles to Restitute Nazi-Confiscated Artworks, Other Stakeholders Rejected this Proposal

While the U.S. preferred a binding international accord committing each stakeholder to implement national legislation to return Nazi-confiscated artworks, many countries rejected this initiative.[12] So to salvage some consensus on the responsibility of stakeholders to return Nazi-confiscated artworks, Eizenstat and Leach instead promoted a non-binding

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[8] Potsdam Remarks, *supra* note 3 at 2.

[9] Secretary of State Madeleine K. Albright, Remarks at Opening of Washington Conference on Holocaust-Era Assets, Washington D.C., December 1, 1998, as released by the Office of the Spokesman, U.S. Department of State at 1. (Available at http://fcit.usf.edu/HOLOCAUST/RESOURCE/Assets/981201.htm.

[10] *Id.* at 2.

[11] *Id.* at 2.

[12] Eizenstat, *supra* note 4 at 198.

agreement by which each country would commit to work within its own discrete national legal system to achieve this goal.[13]

As released on December 3, 1998, the "Washington Conference Principles on Nazi-Confiscated Art" (Washington Principles or Principles) contained 11 principles regarding how countries would address Nazi-confiscated artworks and related claims. Principle 8 prescribed that if the pre-War owners of Nazi-confiscated artworks or their heirs can be identified, a "just and fair" solution should be achieved.[14] A. at 45.

F. Notwithstanding that the Washington Principles are Legally Non-Binding, the U.S. Views Their Purpose as Securing the Return of Nazi-Confiscated Artworks to Rightful Owners

Both Ambassadors Kennedy and Eizenstat have made clear that the purpose of the Washington Principles is to return Nazi-confiscated artworks to rightful owners, and to induce each country to work within its own legal system to do so. As Kennedy declared at Potsdam: "[t]he Washington Principles are based on the simple premise that artworks displaced during the 1933-1945 period should be returned to rightful owners... (and) provide guidelines that could be applied to all countries under their own national laws, procedures and practices."[15] In July 2006, Eizenstat testified before a subcom-

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[13] *Id.* at 198.

[14] Stuart E. Eizenstat, Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference ("Opening Remarks") at 10.

[15] Potsdam Remarks, *supra* note 3.

mittee of the U.S. House Committee on Financial Services (Subcommittee testimony) that the U.S. consistently has employed moral pressure to induce affected nations to return Nazi-confiscated art.[16]

Kennedy said further that the failure to follow these prescriptions invites the moral rebuke of other stakeholders.[17] Similarly, in his Opening Remarks at the Prague Conference, Eizenstat observed that the purpose of the Principles in prescribing that Nazi confiscated artworks be identified is to secure their return to rightful owners.[18]

G. In October 2000, the U.S. and 37 Other Governments Convened in Vilnius, Lithuania to Reaffirm Their Commitment to the Washington Principles

From October 3-5, 2000 officials from 38 governments, including the U.S., convened in Vilnius to confirm their commitment to the Washington Principles. On October 5, 2000, stakeholders agreed to the Vilnius Forum Declaration urging all stakeholders "to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust to the original owners or their heirs" and "to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art...."[19]

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[16] Subcommittee testimony at 6.

[17] *Id.* at 3.

[18] Opening Remarks, *supra* note 14 at 9.

[19] Commission for Looted Art in Europe-Vilnius Forum Declaration, available at www.lootedartcommission.com/vilnius-forum.

H. Despite the 1998 Congressional Legislation and the Washington Principles, U.S. Courts Continued to Time-Bar Judicial Claims to Recover Nazi-Confiscated Artworks

The Principles did not achieve the foreign policy goal of the U. S. to restitute Nazi-confiscated artworks. At a hearing before the Commission on Security and Cooperation in Europe (CSCE) of the Helsinki Commission in Washington D.C. on May 25, 2010 (CSCE Hearing Testimony), Eizenstat testified: "[a]nd here, permit me to be very frank: The momentum following the 1998 Washington conference to return looted art to its rightful owners has significantly dissipated."[20] Indeed, as the court observed in *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 576-77 (5th Cir. 2010), "[n]o court has ever adopted what Appellant is urging here—some form of special federal limitations period governing all claims involving Nazi-confiscated artworks. In such cases, courts have consistently applied state statutes of limitation."

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[20] CSCE Hearing Testimony at 6.

I. To Redress the Failure of the Washington Principles to Return Nazi-Confiscated Artworks to Rightful Owners, The Terezin Declaration Decreed that All Nations Would "*Make Certain*" that Their Discrete National "*Legal Systems*" Resolved Claims for the Recovery of Nazi-Confiscated Artworks "Based on the Facts and Merits of the Claims and All Relevant Documents"

In June 2009—with strong U.S. backing—some 47 nations convened the Prague Holocaust Era Assets Conference (Prague Conference), "the fifth international Holocaust-related conference that began with the 1997 London Conference."[21] In his opening remarks Eizenstat lamented that while the Washington Conference contemplated that each nation would work within its own discrete legal system to achieve the prescribed objectives—most nations had neglected this commitment.[22]

When the Prague Conference ended, the stakeholders promulgated the Terezin Declaration (Declaration) which reaffirmed, clarified, and intensified their commitment to resolving claims for the recovery of Nazi-era artworks on their substantive merits. The Washington Principles had prescribed merely that claims for the recovery of Nazi-confiscated artworks be decided in a "just and fair" manner. The Declaration, however, expressly noted that the Principles had achieved disappointing results, and made clear that each stakeholder commits to ***"make certain"*** that its own national ***"legal system"*** decide such claim not merely in a

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[21] CSCE Prepared Remarks at 1-2.

[22] Opening Remarks, *supra* note 14 at 9.

"just and fair" manner—as the Principles had prescribed—but rather "***on the facts and merits***" of the claim and with reference to "all relevant documents submitted by the parties":

> Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ***ensure*** that their ***legal systems*** or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and ***to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims*** and all relevant documents submitted by all the parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property in order to achieve just and fair solutions, as well as alternative dispute resolutions, where appropriate under law. A at 19-20. (Emphasis, italics, and underlining added).

Both Eizenstat and Kennedy repeatedly have stressed that the purpose of the Declaration is to ensure that courts and other administrative bodies decide claims for the recovery of Nazi-confiscated artworks on their substantive merits, and without regard to otherwise applicable statutes of limitation. Before the Helsinki Commission Eizenstat related that the Declaration: "urged the courts, Mr. Chairman, and other fora that decide art restitution

cases to base their cases on the facts of the individual case rather than relying on technical grounds such as statutes of limitations."[23]

Similarly, Kennedy declared unequivocally that "[t]he Terezin Declaration reinforces the Washington Principles, urging that claims be resolved expeditiously and fairly, ***based on the facts and merits.***" (Emphasis and italics added)[24] Kennedy explained that statutes of limitation frustrate the goal of resolving claims for the recovery of Nazi-confiscated artworks on their merits.[25] He further declared that historical circumstances as well as the uncertainty of the "current restitution processes" make it unfair that claims for the recovery of Nazi-confiscated artworks be barred by statutes of limitation. [26]

Kennedy's comments echo Eizenstat's declaration at the start of the Prague that statutes of limitation frustrate the resolution on the merits of claims to recover Nazi-confiscated artworks. [27]

J. While the U.S. Would Have Preferred to Have Made the Terezin Declaration Legally Binding, It Had to Settle for a "Non-Binding" Agreement That Similarly Relies upon Moral Suasion

At the Commission hearing Eizenstat explained that a "non-binding" agreement was ***the only practical way*** that the U.S. could promote its

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[23] CSCE Hearing Testimony, *supra* note 20 at 6.

[24] Statement by Ambassador J. Christian Kennedy, Special Envoy for Holocaust Issues Delivered During Town Hall Meeting at U.S. Department of State, September 22, 2009 ("Town Hall Statement").

[25] *Id.*

[26] *Id.*

[27] Opening Remarks, *supra* note 14 at 10.

foreign policy of returning property looted during the Holocaust to rightful owners. He said further that the stakeholders expected each country to achieve the stated goals of the Declaration ***in the context of their own national legal systems***: "it is meant to mean that each state can act within its own national laws, as it sees fit, but that these are moral principles that should guide it."[28]

Eizenstat also testified that through the Declaration the parties intended to establish an international benchmark by which the conduct of each country in returning Holocaust property could be gauged.[29]

Finally, Eizenstat related that "[o]ur job in the State Department is to work with the states that participated in the Prague Conference to convert the moral commitments in the Declaration into action. And that's what we're doing with the best practices that we're now negotiating."

The Current Proceeding

On July 24, 2008 Petitioner—the sole heir of Holocaust victim Oskar Reichel—filed her First Amended Answer and Counterclaim in the U.S. District Court for Massachusetts seeking to recover an oil painting by the artist Oskar Kokoschka entitled "Two Lovers" ("the Painting") in the possession of the MFA.[30] The Counterclaim set forth the unconscionable circumstances under which Reichel relinquished the Painting in Vienna Austria in February 1939 to art dealer Otto Kallir in a prototypical "forced sale," induced by rabid and

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[28] CSCE Hearing Testimony, *supra* note 19 at 8.

[29] *Id.* at 8.

[30] Brief of Appellant at 6-7.

intensifying Nazi persecution which already had deprived Reichel of his citizenship, his profession, his business and even his home.[31]

The Counterclaim contrasted sharply with how the MFA characterized Reichel's transfer of the Painting to Kallir. On January 22, 2008 the MFA filed an action for a declaratory judgment asserting that the three-year Massachusetts statute of limitations to recover personal property (Mass. Gen. Laws. Ann. Ch. 260 § 2A (1948)) as precluding any judicial remedy of Petitioner to reclaim the Painting and thus validating MFA's legal ownership. MFA's complaint asserted that "[t]he Painting was never confiscated by the Nazis, was never sold by force as a result of Nazi persecution, and was not otherwise taken from Dr. Reichel."[32] On May 28 2008, the ***Boston Globe*** published an article entitled ***Holocaust historians blast MFA stance in legal dispute,*** assailing the public position of MFA that Nazi persecution did not compel Reichel to relinquish the Painting.[33]

On May 28, 2009 the District Court granted Respondent's motion for summary judgment, ruling that as a matter of Massachusetts law the three-year prescriptive period precluded Petitioner's claim to recover the Painting and denying Petitioner any discovery on her claim. Petitioner appealed this ruling and on September 30, 2008 filed Brief of Appellant which alleged that the MFA had acquired and retained the Painting in bad faith and in breach of its fiduciary duties of honesty, loyalty and transparency to the charitable public trust that it

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[31] *Id.*

[32] *Id.* at 6. MFA Complaint at par. 15

[33] Available at http://www.boston.com/ae/theatre-art/articles/2008/28/holocaust-historians-blast-mf

administers as a federal tax-exempt institution under 26 USCA § 501(c)(3). Petitioner also asserted that MFA's habitual fiduciary malfeasance and lack of public accountability—which the three year Massachusetts limitation period fosters—spawned the criminal trade in stolen art.[34]

On October 14, 2010 the Court of Appeals affirmed the ruling of the District Court. The court said, *inter alia,* that the Terezin Declaration, while "reflect[ing] a clear preference that Nazi-era disputes should be resolved 'based on the facts and merits' rather than on legal technicalities" was nonetheless "too general and too hedged to be used as evidence of an express federal policy disfavoring statutes of limitation." 623 F.3d at 13. The court also said that Petitioner "has not shown that application of the Massachusetts statute of limitations...in this case would cause a 'significant conflict with, or threat to' the federal interests and policies embodied in section 501(c) (3) ...." (Citation omitted). 623 F.3d at 11.

REASONS FOR GRANTING THE PETITION

MFA repudiates how the Court consistently has determined whether the President acts in foreign affairs in a manner that preempts conflicting state law. *MFA* undermines correspondingly the U.S. Constitution which allocates foreign policy to the "political branches" exclusively. *MFA* also subverts substantive U.S. foreign policy to encourage all affected nations to resolve claims for the recovery of Nazi-confiscated artworks on their merits, which

[34] Brief of Appellant at 3.

both Congress and the President have declared and pursued for many years.

MFA holds that an executive agreement between the U.S. and 46 other nations (Declaration) that expresses the textually clear commitment of all "stakeholders" to "make certain" that their discrete national "legal systems" resolve claims for the recovery of Nazi-confiscated artworks on their merits does not preempt—under the Supremacy Clause of the U.S. Constitution—a conflicting Massachusetts three-year prescriptive period for recovering chattels that precludes this objective. [Under this three-year period, the claim of the Reichel family to recover the Painting expired in February 1942, only two months after the attack on Pearl Harbor and one year before the London Declaration]. ***MFA then held that a Massachusetts statute of limitations prevents the U.S. Government from discharging its textually clear foreign policy commitment to 46 other nations in an international agreement.***

MFA reached this result by misapplying a questionable test for foreign affairs preemption that the Court intimated in *American Insurance Ass'n v. Garamendi,* 539 U.S. 396, 420 n.11 (2003) for when a state regulates within an area of "traditional responsibility" or "'competence.'" In such instance, the Court indicated that it might balance or weigh the "importance" of the state interest against the "strength" of the particular foreign policy. Applying this test, *MFA* relied upon the recent and wrongly decided *Dunbar v. Seger-Thomschitz,* 615 F.3d 574 (5th Cir. 2010), and implicitly concluded that the importance to Massachusetts of applying statutes of limitation for the recovery of personal property within its borders outweighed the strength of U.S. foreign policy expressed in the Declaration to resolve

claims for the recovery of Nazi-era artworks on their merits.

MFA's departure from the established tenets of foreign affairs "conflict" or "obstacle" preemption has sweeping significance for:

1) How the U.S. Constitution allocates foreign affairs authority to Congress and the President exclusively—with no role either for states or the Federal Judiciary—and entrusts the Court to ensure that state laws do not impair federal foreign policies;

2) The capability of the President to conduct foreign relations and to settle international claims;

3) The substantive foreign policy of both Congress and the President to return Holocaust-era artworks to rightful owners;

4) The textually explicit foreign policy commitment of the U.S. Government in the Declaration to 46 other stakeholders to "make certain" that the U.S. national "legal system" resolves these claims on their substantive merits;

5) The capability of the State Department to perform its declared mission of persuading other stakeholders to honor this promise;

6) The responsibility of federal tax-exempt institutions such as the MFA under 26 USCA § 501(c)(3) to adhere to clearly declared U.S. public policy to return Nazi-confiscated artworks in their possession to rightful owners;

7) The formal fiduciary duties of federal tax-exempt museums such as the MFA as public trustees to take affirmative precautions against acquiring Nazi-confiscated artworks for their public collections, to be honest with the public about whether they are in possession of Nazi-confiscated artworks, and to return these artworks to rightful owners;

8) Holocaust victims and their heirs internationally seeking to recover Nazi-era artworks;

9) U.S. private collectors in possession of Nazi-confiscated artworks; and

10) The international art market which is centered in New York with its concomitant ***international*** and ***interstate commerce*** in Nazi-era artworks.

I. *MFA* Abandons the Analytical Framework That the Court Consistently Has Employed to Determine When the President Acts in Foreign Affairs in a Manner that Preempts Conflicting State Law—the "Tripartite" Scheme of Justice Jackson in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952)—Thereby Skewing the Court's Preemption Doctrine as well as Recent Foreign Affairs Decisions

A. *MFA* Scuttles the "Tripartite" Framework of *Youngstown*

Medellin v. Texas, 552 U.S. 491, 524 (2008) reaffirmed that the "familiar tripartite scheme" of Justice Jackson in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635 (1952) "provides the accepted framework for evaluating executive action in foreign affairs." 552 U.S at 524. Quoting *Youngstown*, the Court said that in foreign affairs "'[w]hen the President acts pursuant to an express or implied authorization from Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635. Moreover, the Court has adhered to this approach for many years. *See, e.g.*,

Dames & Moore v. Regan, 453 U.S. 654, 668 (1981), quoting *Youngstown*.

The declaration of Congress in the Redress Act that all nations should return Nazi-confiscated artworks to rightful owners—and its allocation of $5 million dollars toward this goal—amplified necessarily the President's ***already presumptively valid*** exercise of claims settlement authority in the Declaration.

MFA, however, ignores that the foreign policy embodied in the Declaration has the explicit textual approval of ***both*** political branches for preemption purposes. *MFA* then discards the lodestar that consistently has guided the Court in resolving the recurring and often vexing constitutional question whether a particular action of the President in foreign affairs preempts conflicting state law.[35] *MFA* thereby skews the Court's decisions and invites further error from the lower courts in this most consequential area.

B. *MFA* Overlooks that the Declaration Reflects a Prototypical Exercise of Presidential International Claims Settlement Authority

In *Medellin* the Court confirmed that the President enjoys a special capability in foreign affairs to settle international claims, and that the acquiescence by Congress for more than 200 years in this practice provides an historical "gloss" on the President's textual constitutional authority that validates this power. (Citation omitted) 552 U.S. at 530-31. Moreover, *Garamendi* said that the

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[35] *See Dames & Moore v. Regan*, 453 U.S. 654, 660-62 (1981).

President's claims settlement authority includes specifically the power to resolve claims emanating from the Holocaust. 539 U.S. at 420.

MFA, however, fails to accord the Declaration the necessary preemptive effect that a paradigmatic exercise of the President's international claims settlement authority entails. *MFA* then undermines the capability of the President to conduct foreign affairs in an area where the Court has affirmed that the President enjoys presumptive autonomy, and to resolve Holocaust claims internationally in the manner that he has selected.

C. *MFA* Ignores that the "Non-Binding" Declaration Reflects a Discrete and Acknowledged Diplomatic Option For the President to Conduct Foreign Affairs and to Settle International Claims

Non-binding executive agreements are a recognized diplomatic alternative for promoting a particular foreign policy when a binding agreement is not politically possible, and create moral and political obligations. *See, e.g., Restatement (Third) of the Law of Foreign Relations of the United States*, § 301 (1986), Reporters Note 2 at 151: "[p]arties sometimes prefer a non-binding agreement in order to avoid legal remedies. Nevertheless, the political inducements to comply with such agreements may be strong and the consequences of non-compliance may sometimes be serious."; Oskar Schacter, *The Twilight Existence of Non-Binding International Agreements*, 71 Am. J. Int'l L. 296, 300 (1977), observing that what "non-binding" means is "simply that non-compliance by a party would not be a ground for a claim for reparation of judicial

remedies... ***[T]he understanding and expectation is that national practices will be modified, if necessary, to conform to those understandings.***" (Emphasis and italics added)

Indeed, Eizenstat explained the purpose of the Declaration in just these terms at the Helsinki Commission Hearing. (This testimony is available at http://csce.gov/index.cfm). By failing to honor the Declaration as a purposefully non-binding executive agreement, *MFA* denied the President a demonstrably ***essential*** diplomatic option to promote U.S. foreign policy to return Nazi-confiscated artworks to rightful owners.

D. *MFA* Presents the Court with a Need to Revisit When State Laws Within an Area of "Traditional Responsibility" Conflict Impermissibly with Executive Branch Foreign Policy and so Are Preempted Under the Supremacy Clause—A Test that the Court Hypothesized in *Garamendi* (539 U.S. at 420, n.11) and *MFA* Applied with Disastrous Consequences

1. The "Balancing" Test for Federal Foreign Affairs Preemption Suggested in Footnote 11 of *Garamendi*

Garamendi intimated a test for federal preemption in foreign affairs when a state addresses a "traditional state responsibility" ("*Garamendi* test") 539 U.S. at 420, n.11. The Court said that when a state regulates in "what Justice Harlan called its 'traditional competence'...but in a way that affects foreign relations, it might make good sense to require a conflict of a clarity or substantiality that

would vary with the strength or the traditional importance of the state concern asserted. Whether the strength of the federal foreign policy interest should itself be weighed is, of course, a further question." *Id.*

This test apparently contemplates that when a state law addresses such "traditional responsibility," the federal courts somehow will *balance* the "importance" of the particular state interest at issue with the "strength" of the foreign policy to determine whether foreign policy preempts state law. "[T]his language suggests that although foreign affairs is exclusively federal and no substantial conflict will be tolerated, the assessment will be made within the context of the relative legitimate interests of the states."[36]

But this test "ignore(s) the problem of discerning state and federal areas of supremacy" and "[a]s such...does not come close to setting a clear standard articulating when a state action sufficiently affects foreign affairs to necessitate preemption."[37] The failure of *Garamendi* to enunciate a clear test for foreign affairs "conflict" preemption is most consequential and deserving of the Court's attention, for preemption is "a bedrock feature of our constitutional system,"[38] and "is almost certainly the most frequently used doctrine of constitutional law in practice."[39] A clear and prospective standard is all the more important in a world in which the

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[36] Ved P. Nand, David K. Pansius, *2 Litigation of International Disputes in Federal Courts*, § 11:10 (2010).

[37] Joseph P. Crace, Jr., "*Gara-mending the Doctrine of Foreign Affairs Preemption*," 90 Cornell L. Rev. 203, 223-224 (2004).

[38] Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 Tulane L. Rev. 1257, 1258 (2010).

[39] Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 226 (2000).

individual states more frequently engage foreign countries in commerce, and the world is more "interconnected."[40]

While foreign affairs preemption doctrine may be a "muddle,"[41] it nonetheless traditionally has embodied certain core principles that the *Garamendi* test would appear to forsake. First, the *Garamendi* test challenges the prevailing assumption that the Court will readily preempt state laws that infringe upon foreign affairs. "Looking at the history of one area of federal law, the Court has been particularly willing to preempt state laws that touch on foreign affairs."[42] *See, e.g. Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985): "in the seminal case of *Hines v. Davidowitz*, 312 U.S. 52...(1941), the Court inferred an intent to preempt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs...is made clear by the Constitution.' *Id.* at 62." And "[m]any have concluded that *Hines* establishes a rule that preemption is much more easily found when Congress has passed legislation relating to foreign relations." (Citation omitted)[43]

Second, the *Garamendi* test repudiates the Court's traditional approach to preemption—especially in foreign affairs—which views the importance of the affected state interest as

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[40] *See, e.g.*, Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. Ct. Rev. 175, 196 (2000).

[41] Nelson, *supra* note 39 at 232-33. *See also* Goldsmith, *supra* note 40 at 178: "[t]he Supreme Court's preemption jurisprudence is famous for its incoherence. The doctrines of preemption are vague and indeterminate."

[42] Daniel E. Troy, Rebecca K. Wood, *Federal Preemption at the Supreme Court*, 2008 Cato Sup. C. Rev. 257, 274.

[43] Goldsmith, *supra* note 40 at 188.

inconsequential. *See, e.g. Felder v. Casey*, 487 U.S. 131, 138 (1988), "[u]nder the Supremacy Clause of the federal Constitution, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law for 'any state law, however within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' Citing *Free v. Bland* , 369 U.S. 663, 666 (1962)"; *United States v. Belmont,* 301 U.S. 324, 331 (1937): "[i]n respect of all negotiations and compacts, and in respect of our foreign relations generally... state policies *are irrelevant to the inquiry and decision*." (Italics supplied)

Third, by envisioning that courts will balance the "strength" of clearly articulated U.S. foreign policy against the "importance" of competing state interests, the *Garamendi* test necessarily accords the Federal Judiciary a pivotal role in foreign affairs. This test would appear to allow federal courts to nullify expressly declared foreign policy objectives of both political branches whenever a court believes that competing state interests should predominate—thereby making the Judiciary, and not Congress and the President, the ultimate arbiter of U.S. foreign policy.

This role violates the U.S. Constitution and also contravenes the consistent historical understanding of the Court that foreign affairs decisions belong exclusively to the political branches (Congress and the President). The federal judiciary has ***no*** substantive foreign affairs authority. *See, e.g Medellin v. Texas,* 552 U.S. 491, 511 (2008), reaffirming the "principle that '[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political Departments'" (citing *Oetjen v. Central Leather Co.*,

246 U.S. 297, 301 (1918). Accordingly, "the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen*, 246 U.S. at 302. *See also, e.g., Garamendi*, 539 U.S. at 427 observing that "our thoughts on the efficacy of the one approach or the other are beside the point, since our business is not to judge the wisdom of the National Government's policy: dissatisfaction should be addressed to the President, or, perhaps, Congress."; *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 512 U.S. 79, 89 (1994), '[w]ithin the federal system, at least, we have decided that that function of weighing and appraising is more appropriately for those who write the laws, rather than for those who interpret them.'" (Citation and quotations omitted); *Dames & Moore v. Regan*, 453 U.S. 654, 660 (1981), noting that "the Framers 'did not make the judiciary the overseer of our Government.'" (Citation omitted). So "with regard to foreign affairs, judicial decision making bypasses procedural safeguards of the legislative process, producing a lack of political accountability and democratic legitimacy."[44]

Not only does the *Garamendi* test discount established tenets of foreign affairs preemption, it also opens a Pandora's box of questions about how federal courts should administer this test. Even assuming, *arguendo*, that this test reflected a valid exercise of federal judicial authority, what standards does a federal court invoke to balance or weigh the "strength" of an expressly stated and constitutionally legitimate foreign policy against the comparative "importance" of a conflicting state law? As a threshold matter, is a federal court equipped to gauge the

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[44] Joseph P. Crace, Jr., *Gara-mending the Doctrine of Foreign Affairs Preemption*, 90 Cornell L. Rev. 203, 229 n. 171 (2003).

true "strength" of a discrete foreign policy without jeopardizing a delicate and subtle balance of reciprocal concessions? Can a state immunize a particular law from preemption merely by declaring the importance of such law? Does an implicit balance decimate the traditional doctrine of "conflict" or "obstacle" preemption in foreign affairs in which all that has traditionally been required is an ascertainable conflict between express foreign policy and state law?[45]

Petitioner respectfully submits that the *Garamendi* implied "balancing" test is neither judicially appropriate nor manageable. Rather, the Court should limit its inquiries in federal foreign affairs preemption to: (1) whether the President's foreign policy in a particular instance is constitutionally valid under *Youngstown*, or represents an exercise of international claims settlement authority; and (2) whether the Executive Branch or Congress have stated the policy with sufficient clarity. These inquiries evoke core judicial competence. If the answer to both questions is in the affirmative, the Supremacy Clause requires that foreign policy preempt state law, regardless of the importance to the state of the particular interest in question or whether the law represents an exercise of a state's "traditional responsibility."

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[45] *See, e.g.*, *Garamendi*, 539 U.S. at 427; Goldsmith, *supra* note 40 at 185.

2. *MFA* Applied the *Garamendi* Test in a Manner That Makes Manifest Its Many Deficiencies and that Subordinates to State Prerogatives the Textually Clear and Proactive Foreign Policy of ***Both*** Congress and the President to Return Nazi-Confiscated Artworks to Rightful Owners

MFA makes palpable the many deficiencies of the *Garamendi* implied balancing test. As a threshold matter—and as noted—the transparent conflict between the clearly stated foreign policy embedded in the Declaration and the subject Massachusetts prescriptive period preempts Massachusetts law under any traditional foreign affairs preemption standard. Any contrary conclusion would allow state law to obstruct the textually clear foreign policy of both political branches in an executive agreement that also represents a prototypical exercise of Presidential international claims settlement authority. **But this is precisely what *MFA* does.**

MFA distinguished between the category of preemption in *Garamendi* and the argument that federal foreign policy expressed in the Declaration preempted the subject Massachusetts prescriptive period. 623 F.3d at 12. *MFA*, however, overlooked that in *Garamendi* the Court made clear that even when a state acts within such an area of "traditional competence"—with no intention of affecting foreign affairs—Executive Branch foreign policy nonetheless preempts such law if it has more than a merely incidental impact upon foreign policy, and most certainly when the state law frustrates or sabotages clearly expressed foreign policy objectives. The Court observed that even under the judicial view of preemption that protects the autonomy of the several

states to the greatest degree, "the likelihood that state legislation will produce something more than an incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law." 539 U.S. at 420.

MFA, however, disregards this principle. While *MFA* acknowledges that the Declaration "reflects a clear preference that Nazi-era art disputes should be resolved 'based on the facts and merits' rather than legal technicalities" (623 F.3d at 13), *MFA* concludes nonetheless that this policy either was not sufficiently "weighty" or adequately stated to overcome the interest of Massachusetts in prescribing time limits for the recovery of personal property. *Id.* at 13-14.

MFA savages traditional foreign affairs "conflict" preemption doctrine. First, it ignores that all that has traditionally been required for federal foreign affairs preemption is a concrete conflict between legitimate federal foreign policy and state law. *Garamendi* reaffirms this principle. The clearly articulated U.S. foreign policy textually expressed in the Declaration satisfies this test beyond question.

Second, *MFA* all but obliterates the doctrine of conflict preemption in foreign affairs. *MFA* requires something tantamount to *express* preemption—an explicit statement by Congress or the President of a federal intent to preempt *specific* state laws (statutes of limitation) in a particular foreign affairs context. This prescription lacks Court precedent and is unworkable. If validated, it would undermine the capability of the political branches to conduct foreign policy. [46]

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[46] *See, e.g.*, Crace, *supra* note 37 at 232, relating that "[i]n the high stakes world of foreign affairs, Congress or the President

II. *MFA* Mistakes the Politically Brokered and Purposefully Non-Binding Language of the Declaration with the Far More Emphatic Foreign Policy of Both Congress and the President to Return Nazi-Confiscated Artworks to Rightful Owners Thereby Undermining—Correspondingly—U.S. Foreign Policy in Several Important Ways

MFA fails to distinguish the politically circumspect Declaration from the impassioned substantive U.S. foreign policy of both Congress and the President to return Nazi-confiscated artworks to rightful owners. *Garamendi* made clear that it is the substantive Executive Branch foreign policy that preempts conflicting state law and ***not*** the agreement itself. The Court noted that because the subject executive agreements "include no preemption clause," the preemption claim must "rest on asserted interference with the foreign policy those agreements embody." 539 U.S. at 417.

MFA misapplies this principle. *MFA* reasons that the Declaration's "language is too general and too hedged to be used as evidence of an express federal policy disfavoring statutes of limitations." 623 F.3d at 13. *MFA*, however, ignores that substantive U.S. foreign policy to return Nazi-era artworks is far stronger and more compelling than the temperate language of the Declaration.

MFA also misconstrues the Declaration in several other respects, impairing U.S. foreign policy correspondingly. MFA quotes language from the Declaration "that 'various legal provisions that may impede the restitution of art...' will continue to be

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often cannot effectively respond to offensive state activity before adverse consequences occur."

applied." 623 F.3d at 13. But rather than exonerating stakeholders from honoring their reciprocal commitments to resolve claims for the recovery of Nazi-confiscated artworks on their merits based upon their individual legal systems, this language instead seeks to ensure that each nation will achieve this objective within the context of its own legal tradition, ***notwithstanding*** that these traditions may vary and that legal provisions ***other*** than statutes of limitation might otherwise impede this goal.

MFA subverts U.S. foreign policy to return Nazi-confiscated artworks to rightful owners in several ways. First, *MFA* frustrates the clearly-declared substantive foreign policy of both political branches that U.S. courts adjudicate claims for the recovery of Nazi-confiscated artworks on their substantive merits.

Second, *MFA* breaches the promise of the U.S. Government in the Declaration to "make certain" that its national "legal system" resolves judicial claims for the recovery of Nazi-confiscated artworks on their substantive merits. *MFA*, then, undermines U.S. foreign policy credibility and commitment on an important issue that both Congress and the President have engaged and upon which the U.S. Government has taken the international initiative. *MFA* also almost certainly causes collateral but perhaps indeterminate damage to U.S. credibility on other foreign policy issues.

Third, by refusing to honor the U.S. commitment in the Declaration to "make certain" that the U.S. national "legal system" resolves claims for the recovery of Nazi-confiscated artworks on their merits, *MFA* precludes any possibility that the U.S. Government can persuade other stakeholders to

honor their reciprocal commitments. Eizenstat identified this to be U.S. foreign policy after the Declaration.

III. *MFA* Ignores that as a Coordinate Branch of the U.S. Government the Federal Judiciary—in the Absence of Congressional Legislation Implementing the Declaration—Has an Affirmative Responsibility to "Make Certain" (as the Declaration Prescribes) that the U.S. National "Legal System" Resolves Judicial Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits By Invoking Appropriate Federal Common Law To Achieve This Objective

A. The Federal Judiciary Appropriately Applies Federal Common Law to Protect the Interests of the U.S. Government in Foreign Affairs

"Many of the rules that the Supreme Court... characterizes as federal common law are merely background rules that federal and state courts apply in order to avoid encroaching upon authority committed by the Constitution to Congress and the President. This is particularly true with respect to rules relating to foreign affairs."[47] Accordingly, "there is a remarkable consensus about the legitimacy of federal common law in foreign relations... Foreign relations is viewed as a special case because it is viewed as the exclusive prerogative of the federal government."[48] The traditional view is that courts

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[47] Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1252 (1996).

[48] Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 Va. L. Rev. 1617, 1632 (1997).

must apply federal common law in foreign affairs when necessary to safeguard "structural constitutional guarantees" and to ensure that state laws do not undermine U.S. foreign relations.[49] Accordingly, such "judge-made federal foreign relations law" constitutes the legitimate voice of the federal government in foreign affairs "until the federal political branches say otherwise."[50] *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n. 25 (1964) ("[v]arious constitutional and statutory provisions... reflect[ ] a concern for uniformity in this country's dealing with foreign nations and indicate a desire to give matters of international significance to the jurisdiction of the federal institutions."

In *Sabbatino* the Court invoked federal common law to protect the capability of the federal political branches to conduct foreign policy and to obviate state intrusions. *Sabbatino* underscored that the act of state doctrine was part of the federal common law, and that despite *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938) (generally abrogating "federal common law"), "there are enclaves of federal judge-made law which bind the states... and [p]rinciples formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal interests." 376 U.S. at 426. The Court said further that the "vitality" of the act of state doctrine as a principle of federal common law "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs." *Id.* at 427-28. *Sabbatino* deemed a uniform federal rule necessary to preclude the several states from impairing U.S. foreign policy

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[49] *Id.*

[50] *Id.*

by applying discrete and potentially provincial rules of decision to judicial controversies with foreign nations.

For these same reasons the Court should exercise its federal common law authority to create a uniform rule of timeliness for state courts when adjudicating claims for the recovery of Nazi-confiscated artworks. Just as the act of state doctrine in *Sabbatino* reflected the appropriate constitutional balance of authority "between the judicial and political branches of the Government on matters bearing upon foreign affairs," so, too, the Declaration entails a similar balance as it expresses the substantive foreign policy of both Congress and the President on how U.S. courts should decide judicial claims to recover Nazi-confiscated artworks. Just as in *Sabbatino*, the Court must fashion a uniform rule of decision for all U.S. courts adjudicating claims to recover Nazi-confiscated artworks that acknowledges the constitutional authority of the political branches to formulate substantive foreign policy in this area and implements—correspondingly—the express commitment of the U.S. Government in the Declaration to ensure that its national "legal system" resolves judicial claims for the recovery of Nazi-confiscated artworks on their substantive merits.

Moreover, the Court long has acknowledged the capability of the President—in the conduct of foreign affairs—to alter the substantive law that applies in private litigation. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981), noting "the difference between modifying federal court jurisdiction and directing courts to apply a different rule of law... ***The President has exercised power, acquiesced in by Congress, to settle claims, and as such, has simply effected a change in the substantive law governing the lawsuit.***" (Emphasis and italics added).

B. That the MFA is a Tax-Exempt Public Trustee under 26 USCA § 501(c) (3)—Required as a Matter of Law to Adhere to Clearly Declared U.S. Public and Foreign Policy—Makes It All the More Important That the Court Invoke Appropriate Federal Common Law

The U.S. Government has an acute interest in ensuring that the federal tax laws—including the tax exemption for charitable educational institutions under 26 USCA § 501(c)(3) that the MFA and many other U.S. museums enjoy—operate as Congress intended. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,* 545 U.S. 308, 315 (2005). Moreover, "[f]or the large number of U.S. arts organizations (such as MFA) whose existence depends on private charitable donations, qualification for federal tax exemption under IRC 501(c)(3) is effectively a requirement for survival."[51]

In *Bob Jones University v. United States*, 461 U.S. 574 (1983) the Court affirmed an IRS ruling revoking the federal tax-exemption of a university that proscribed interracial dating. 461 U.S. at 599. The Court held that in addition to the statutory requirements for tax-exemption, "underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity—namely that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy." 461 U.S. at 586. The Court said further that because the university's dating proscriptions violated the public policy of racial equality that all three branches of the U.S.

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[51] Micah J. Burch, *National Funding for the Arts and Internal Revenue Code § 501(c)(3),* 37 Fla. St. U.L. Rev. 303, 303 (2010).

government had prescribed, "an educational institution engaging in practices affirmatively at odds with this declared position of the whole government cannot be seen as exercising a 'beneficial and stabilizing influence in community life'" that justifies its exemption from federal taxation. (Citation omitted) 461 U.S. at 599. [52]

Correspondingly, both Congress and the President have prescribed an unequivocal foreign policy seeking to return Nazi-confiscated artworks to rightful owners, and so similarly have declared the policy of the "whole government" on this question. Moreover, this policy addresses the "core" exempt function of the MFA as a putative charitable educational institution that collects artworks for the ostensible purpose of educating the public. Just as the university in *Bob Jones* was necessarily accountable to federal public policy concerning racial equality, so, too, must the MFA as a § 501(c)(3) institution be accountable to U.S. foreign policy on Nazi-era artworks, and to the commitment of the U.S. Government in the Declaration to "make certain" that the U.S. national "legal system" resolves these claims on their substantive merits.

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[52] *Bob Jones* "is the judicial cornerstone" of the "public policy doctrine" requiring tax-exempt entities to operate consonant with clearly established public policies. Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 U.Kan.L.Rev. 397, 400 (2005).

C. The Failure of Respondent and Other Federal Tax-Exempt Museums—as Public Trustees Under § 501(c)(3)—to Discharge Their Fiduciary Duties of Loyalty, Care and Obedience that They Owe the Public in Their Stewardship of Artworks—Which Failure State Statutes of Limitations ***Incentivize***—Threatens Multiple Federal Interests

"Fiduciary obligations arise from museums' statuses as charitable trusts or non-profit corporations. Museum managers are trustees and thus are subject to the fiduciary duties common to all public and charitable trusts."[53] These include "the duty of care, the duty of loyalty and the duty of obedience." [54] The duty of obedience is "unique to the not-for-profit sector and recognizes that, as an institution held in public trust...[its] success is defined by the efficacy with which it fulfills its mission."[55] Because the "public is the ultimate beneficiary of a public charitable trust,"[56] "[t]he trustees of an art museum... owe a fiduciary duty ... to the public as a whole."[57] Moreover, 26 CFR § 1.501(c)(3)-(1)(c) requires tax-exempt entities to operate in a manner that does not encourage illegal or criminal activity: "the operation test examines the

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[53] Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. Rev. 473, 493 (2010).

[54] Peggy Sasso, *Searching for Trust in the Not-For-Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability*, 50 U.C.L.A. L. Rev. 1485, 1485 (2003).

[55] *Id.*

[56] Jason R. Goldstein, *Deaccession: Not Such a Dirty Word*, 15 Cardozo Arts & Ent. L. J. 213, 214 n.5 (1997).

[57] *Id.* at 214.

actual... activities in practice and day-to day functioning" of a tax-exempt institution. [58]

The duties of care, loyalty and obedience collectively require that museums take reasonable and informed precautions against accepting Nazi-confiscated and other stolen artworks as charitable donations: "[i]n acquiring works and dealing with the risk of stolen works, museums must fulfill their duty of care,"[59] and "museums that do not exercise sufficient due diligence in acquiring works of art are ...breaching their public and fiduciary obligations."[60]

The charitable trustee's duty of loyalty to the public entails a heightened duty of honesty—"[n]ot honesty alone, but the punctilio of an honor the most sensitive, is...the standard of behavior."[61]

U.S. museums habitually fail to exercise appropriate precautions against accepting Nazi-confiscated and other stolen artworks into their public collections. *See, e.g.*, Linda F. Pinkerton, *Acquisition Policies Concerning Stolen and Illegally Exported Art*, 5 Vill. Sports & Ent. L. J. 59, 59 (1998), "[i]f the art market is going to be cleaned up, that is freed of so much stolen and smuggled artwork, art museums in the United States are going to have to abandon the back seat and take a leading role in the cleaning. The dialogue and rhetoric have not changed for decades."; Julia A. McCord, *The Strategic Targeting of Diligence: A New Perspective*

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[58] Gina M. Lavarda, *Nonprofits: Are You at Risk of Losing Your Tax-Exempt Status?*, 94 Iowa L. Rev. 147, 181 (2009)

[59] Graefe, *supra* note 53 at 495.

[60] Patty Gerstenblith, *Acquisition and Deaccession of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 Cardozo J. Int'l & Comp. L. 409, 453 (2003). *See also* Graefe, *supra* note 53 at 495-96.

[61] *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E.545, 546 (1928).

on Stemming the Illicit Trade in Art, 70 Ind. L.J. 985, 997 (1995), "if museums could be eliminated from the illicit art trade, illegal art dealing could be significantly reduced."; Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 How. L.J. 17, 30 (1993), museums have "become a significant portal of entry for...stolen goods into the visible and legitimated world of art."

The pandemic failure of U.S. museums to take precautions against acquiring Nazi-confiscated artworks over the years—despite the warnings of the U.S. Government both in 1946 and 1951—has resulted in their being in possession of many contraband materials. *See, e.g.*, Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Artworks Looted By the Nazis in World War II?*, 30 Rutgers L. J. 441 (1999). *See also* http//www.nepip.org. in which 171 museums participating in the Nazi-Era Provenance Internet Portal Project of the American Association of Museums (and investigating the ownership history of their collections apparently for the ***first time***)—have identified (as of January 2, 2011) some 28,339 artworks in their collections that were potentially lost during the years 1933-45 as a result of Nazi coercion.

Applying state statutes of limitation to claims for the recovery of Nazi-era artworks threaten federal interests because these periods enable § 501(c)(3) museums to conceal their fiduciary malfeasance in acquiring and retaining contraband materials—such as MFA has done. This result not only misallocates increasingly scarce tax dollars but also makes U.S. museums catalysts for the international criminal trade in stolen art and cultural property. For as long as tax-exempt museums such as the MFA can raise a

three-year or comparable limitation period to defeat claims by rightful owners to recover Nazi-confiscated artworks, they have ***no legal incentive*** to obey their fiduciary duties, reform their lax acquisition practices, or adhere to U.S. public policy. Indeed, *MFA* concedes that because statutes of limitations "do not address the merits of a claim", they "do not vindicate the conduct of parties who successfully invoke them". 623 F.3d at 14. "[W]e make no judgment about the legality of the MFA's acquisition of the Painting in 1973", and MFA's apparent failure to investigate the Painting then was "legally inconsequential in this case." *Id.*

Moreover, "more than 100,000 works of art stolen by the Nazis are still missing." [62] If the Court does not reverse *MFA*, these artworks will continue to circulate throughout the U.S. art market immune from the judicial claims of rightful owners and be donated at taxpayers' expense to U.S. tax-exempt museums—notwithstanding the express foreign policy of both Congress and the President (the grantors of tax-exempt status) to return these artworks to rightful owners.

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[62] Graefe, *supra* note 53 at 474.

D. Federal Common Law—and Federal Equitable Doctrine—Are the Appropriate Means For the Court To Ensure that the U.S. Government Fulfills Its Foreign Affairs Commitment in the Declaration to "Make Certain" that the U.S. National "Legal System" Resolves Judicial Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits and in a "Just and Fair" Manner and that U.S. Tax-Exempt Museums Discharge Their Fiduciary Duties to the Public

Federal common law authority extends to replacing state prescriptive periods that impair federal policies or interests with alternative federal statutes of limitation or the equitable doctrine of laches. *See Occidental Life Insurance Company v. EEOC*, 432 U.S. 355, 367 (1977), ***"(s)tate legislatures do not devise their limitation periods with national interests in mind***, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." (Citation omitted, emphasis and italics added).

By prescribing the flexible federal equitable doctrines of laches and unclean hands as a uniform rule of decision for U.S. courts adjudicating judicial claims to recover Nazi-confiscated artworks, the Court would implement appropriately the commitment of the U.S. Government in the Declaration to "make certain" that the U.S. national "legal system" resolves claims for the recovery of Nazi-confiscated artworks on their substantive merits and in a "just and fair manner." For unlike rigid statutes of limitation and related accrual principles, federal equitable doctrine focuses instead upon the fundamental

fairness of allowing a particular claim to proceed in a given context. *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). Most importantly, federal equitable doctrine also explicitly promotes the discrete public policies that the U.S. government has enunciated in a particular context. *See, e.g., Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937): "(c)ourts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved"; *United States v. Morgan*, 307 U.S. 183, 194 (1939). And the federal equitable doctrine of "unclean hands" expressly accommodates the public interest. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery*, 324 U.S. 806, 815 (1945). Federal equitable doctrine therefore can implement the foreign policy of the Declaration to resolve claims for the recovery of Nazi-era artworks on their merits. *See Schoeps v. Museum of Modern Art et. al.*, 594 F. Supp.2d 461, 467 (S.D.N.Y. 2009) applying in a diversity action New York equitable principles to entertain on their merits consolidated claims against two New York museums for the recovery of two iconic Picasso paintings that a victim of Nazi persecution putatively lost as a result of duress during the Nazi era.

Federal equitable doctrine also can redress the systemic failure of Respondent and other federal tax-exempt § 501(c)(3) museums to discharge their fiduciary duties that they have neglected. *See, e.g. Westinghouse Electric & Manufacturing Company v. Wagner Electric & Manufacturing Company*, 225 U.S. 604 620 (1912), "[o]n established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own

wrong." "A constructive trust arises where a person in a fiduciary relation acquires or retains property in violation of his duty as a fiduciary."[63]

CONCLUSION

For the foregoing reasons the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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[63] V. Austin, W. Scott, *et al.*, *The Law of Trusts*, § 495 at 496 (4th ed. 1989).

No. _____

In The

Supreme Court Of The United States

CLAUDIA SEGER-THOMSCHITZ,
Petitioner

v.

MUSEUM OF FINE ARTS, BOSTON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPENDIX

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United States Court of Appeals
For the First Circuit

No. 09-1922

MUSEUM OF FINE ARTS, BOSTON,
Plaintiff, Appellee,
v.
CLAUDIA SEGER-THOMSCHITZ,
Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Rya W. Zobel, *U.S. District Judge*]

Before
Torruella and Lipez, *Circuit Judges*,
and Barbadoro,* *District Judge*.

Thomas J. Hamilton, with whom *J. Owen Todd*, *David H. Rich*, and *Todd & Weld, LLP* were on brief, for appellant.

Simon J. Frankel, with whom *Theodore P. Metzler, Covington & Burling LLP*, *Robert J. Muldoon, Jr.*, *Thomas Paul Gorman*, and *Sherin & Lodgen LLP* were on brief, for appellee.

October 14, 2010

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*Of the District of New Hampshire, sitting by designation.

LIPEZ, ***Circuit Judge.*** Claudia Seger-Thomschitz, the sole surviving heir of Austrian-Jewish art collector Oskar Reichel, seeks to recover possession of Oskar Kokoschka's *Two Nudes (Lovers)* ("the Painting"), a valuable oil painting formerly owned by Reichel and now held by the Museum of Fine Arts, Boston ("the MFA"). Seger-Thomschitz alleges that Reichel was forced to sell the Painting under duress after Austria was annexed by Nazi Germany in 1938 and that good title never passed to the original purchaser or to the MFA. The MFA counters that the original transaction was valid and that Seger-Thomschitz's claim to the Painting is time-barred in any event.

After private negotiations between Seger-Thomschitz and the MFA proved fruitless, the MFA commenced this action for a declaratory judgment to "confirm its rightful ownership of the painting." The district court granted summary judgment for the MFA on statute of limitations grounds, holding that Seger-Thomschitz's claims were time-barred. Having carefully reviewed the record, we now affirm that statute of limitations ruling.

I.

Oskar Reichel was a successful physician and art collector in Vienna during the first decades of the twentieth century. Before World War I, Dr. Reichel came to know Oskar Kokoschka, the celebrated Austrian expressionist, and became an early patron and collector of Kokoschka's work. Dr. Reichel acquired a number of Kokoschka paintings during that period, including *Two Nudes (Lovers)*, which he purchased from Kokoschka in 1914 or 1915. The Painting is a self-portrait of the artist in an embrace with Viennese socialite (and widow of composer

Gustav Mahler) Alma Mahler, with whom Kokoschka was having a tempestuous affair at the time. The MFA describes the Painting as "large and striking," measuring more than three feet wide and five feet tall.

During the interwar period, Dr. Reichel lent the Painting on three occasions to Otto Kallir,[1] the proprietor of the Neue Gallery in Vienna, for display and possible sale. Dr. Reichel and Kallir agreed to a sale price for the Painting on at least two of those occasions: $1,800 U.S. dollars (gross) in 1924 and 4,000 Austrian schillings (net to Dr. Reichel) in 1933.[2] Although Dr. Reichel was able to sell six of his eleven Kokoschka works between the wars, he never sold the Painting, which remained in his possession until 1939 along with four other Kokoschka works.

Conditions for Dr. Reichel and other Austrian Jews rapidly deteriorated following the Anschluss—the annexation of Austria by the Third Reich in March 1938. Pursuant to Nazi regulations, Dr. Reichel was forced to file a declaration in June 1938 listing all of the valuable property he owned. One expert witness described the declaration as a "prelude to the formal Nazi confiscation and seizure of all Jewish-owned property in Austria and Germany." Proceeds from the sale of declared property had to be deposited into a Nazi-controlled account and could be withdrawn only in limited amounts. In his 1938 property declaration, Dr. Reichel stated that he owned the Painting and four

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[1] At the time, Kallir was known professionally as Otto Nirenstein or Otto Kallir-Nirenstein. He legally changed his name to Kallir in 1933.

[2] The parties have not attempted to convert the various currencies noted in the opinion to present day dollars. We simply report the sums as they appear in the record.

other Kokoschka works. He declared the combined value of the Painting and another work to be 250 Reichsmark.

Around the same time, Kallir, who was also Jewish, transferred ownership of his gallery to his non-Jewish secretary and moved to Paris. While Kallir was in Paris, Dr. Reichel agreed to transfer his remaining five Kokoschka works, including the Painting, to Kallir. The details of this transaction are sketchy. It is not clear whether Dr. Reichel received any consideration for the works at the time. Two contemporaneous notes indicate that Kallir agreed to purchase the five paintings for a total of 800 Swiss francs. However, Dr. Reichel's son Raimund later said that his father arranged for Kallir to send the proceeds of the transaction to another son, Hans, who had already immigrated to the United States. According to Raimund, Kallir sent Hans $250 for the five paintings in 1940 or 1941, and Hans forwarded half that sum to Raimund. The five Kokoschkas, including the Painting, were transferred from Dr. Reichel to a shipping company in Vienna, then exported to Paris.

Dr. Reichel and his wife Malvine suffered at the hands of the Nazis. They were forced to close the business Dr. Reichel had founded and to give up their family home and another property. Their eldest son was deported to Lodz, Poland, where he was killed. Malvine was sent to the Theresienstadt concentration camp in 1943, and Dr. Reichel died of natural causes that same year. The two younger sons had emigrated by that time—Hans to the United States and Raimund to Argentina. Malvine survived the war and eventually joined Hans in the United States.

Meanwhile, Kallir had settled in New York, where he opened the Galerie St. Etienne. He brought the Painting with him and sold it to the Nierendorf Gallery for $1,500 in 1945. The Nierendorf Gallery then sold the Painting to the E.A. Silberman Galleries, which in turn sold the Painting to Sarah Reed Blodgett in 1947 or 1948. Blodgett kept the painting for many years, lending it out for exhibitions from time to time. She eventually bequeathed the Painting to the MFA, which acquired possession in 1973.[3] The Painting has been on almost continuous display at the MFA since then, though it has been loaned out many times for exhibitions in the United States and around the world.

Raimund moved back to Vienna in 1982. He executed a will in 1989, in which he designated Seger-Thomschitz as his sole heir. It is not clear how Raimund and Seger-Thomschitz knew each other. She is described in one document as his "select-niece," but they are not blood relatives. When Raimund died in 1997, Seder-Thomschitz became the sole surviving heir of Dr. Reichel.[4]

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[3] Blodgett bequeathed another Kokoschka painting, *Portrait of a Youth*—which depicts Hans Reichel as a boy—to her daughter. Seger-Thomschitz claimed ownership of that painting as well, but the U.S. District Court for the Eastern District of Louisiana found that Blodgett's daughter had acquired title through acquisitive prescription (a civil law doctrine analogous to adverse possession) and that Seger-Thomschitz's claims were time-barred in any event. *See Dunbar v. Seger-Thomschitz*, 638 F. Supp. 2d 659, 663-64 (E.D. La. 2009). The Fifth Circuit recently affirmed that decision. *See Dunbar v. Seger-Thomschitz*, No. 09-30717, 2010 WL 3292678 (5th Cir. Aug. 20, 2010).

[4] Hans died in 1979. His will designated Raimund as his sole heir.

Seger-Thomschitz says that she "first learned that the Nazis confiscated artworks from Oskar Reichel in the Fall of 2003 when the Museums of Vienna contacted her concerning their intent to return to her as the sole heir of Oskar Reichel four artworks in their collection by the artist Anton Romako...." The restitution of the Romako works was pursuant to a municipal resolution that Vienna had passed in 1999, which in turn implemented a 1998 national art restitution law. One municipal document notes that "it seemed quite proper" to return the works to Seger-Thomschitz because Dr. Reichel "had to sell [them] due to his persecution as a Jew." Notably, Dr. Reichel appears to have sold the Romako works around the same time that he sold the Painting, and under similar circumstances. He sold three of the four Romakos to the Neue Gallery in 1939 "for only small equivalent amounts," and he sold the fourth to the Neue Gallery in 1942. The gallery, by then under the direction of Otto Kallir's former secretary, subsequently sold the Romakos to the city.

Following her correspondence with the Museums of Vienna, Seger-Thomschitz retained a Viennese attorney, Erich Unterer—who had also been Raimund Reichel's attorney—"for purposes of handling the restitution of any artworks that Oskar Reichel may have lost due to Nazi persecution." Seger-Thomschitz and Unterer initially thought that all of the artwork Dr. Reichel lost during the Nazi era had been returned. In 2006, however, an American attorney "began a colloquy" with Seger-Thomschitz and alerted her to the possibility that other works formerly owned by Dr. Reichel might be located outside Austria. Seger-Thomschitz retained the attorney, whose firm then sent a letter to the

MFA on March 12, 2007, demanding the return of the Painting.

When confronted with Seger-Thomschitz's claim to the Painting, the MFA undertook "an exhaustive effort to research and document the provenance of the Painting in order to ascertain whether the claim... appeared valid or not." An MFA curator and an independent provenance researcher spent eighteen months researching the Painting's history, during which time they visited approximately ten museums and governmental archives around the world and corresponded with numerous other museums and archives. Based on that research, the MFA concluded that the original transfer of the Painting from Dr. Reichel to Kallir was valid and that it would retain the Painting in its collection. It commenced an action against Seger-Thomschitz in the United States District Court for the District of Massachusetts on January 22, 2008, seeking a declaratory judgment to "confirm its rightful ownership of the painting." Seger-Thomschitz answered the complaint in May of that same year and asserted counterclaims for conversion, replevin, and other state law causes of action.

In September 2008, the MFA filed a motion for summary judgment arguing that all of Seger-Thomschitz's counterclaims were time-barred as a matter of law. Seger-Thomschitz opposed the motion for summary judgment and also filed a motion to amend her answer to add a theory of fraudulent concealment (which might have extended the limitations period, *see* Mass. Gen. Laws ch. 260, § 12) and an accompanying affidavit requesting the postponement of summary judgment proceedings so that she could have extra time to conduct discovery

on the fraudulent concealment theory, *see* Fed. R. Civ. P. 56(f).

The district court granted the motion for summary judgment and denied the motion to amend. *See Museum of Fine Arts, Boston v. Seger-Thomschitz*, No. 08-10097, 2009 WL 6506658 (D. Mass. June 12, 2009). Applying the three-year Massachusetts statute of limitations applicable to tort and replevin actions, Mass. Gen. Laws ch. 260, § 2A, the district court held that the causes of action against the MFA accrued when the Reichel family and/or Seger-Thomschitz discovered or should reasonably have discovered the basis for their claims to the Painting. *Museum of Fine Arts*, 2009 WL 6506658 at *7. It then addressed both the Reichel family's knowledge and Seger-Thomschitz's knowledge, concluding that all parties should have known about the basis for their claims more than three years before Seger-Thomschitz made her demand on the MFA, through her attorney's letter. It also denied the motion to amend. Judgment was entered in favor of the MFA,[5] and this appeal followed.

II.

Only a narrow range of issues is presented on appeal. Because the district court proceedings ended with summary judgment on statute of limitations grounds, we are not asked to judge the validity of the original transfer of the Painting from Dr. Reichel to Kallir. On this record, given the passage of time, the

[5] The judgment reads, in relevant part: "IT IS ORDERED AND ADJUDGED that Defendant Dr. Claudia Seger-Thomschitz does not have a valid claim to the painting *Two Nudes (Lovers)* by Oskar Kokoschka because any claim by defendant to that painting is time-barred."

validity of the transfer "is not clear-cut."[6] *See id.* at *6. The question we face, however, is whether Seder-Thomschitz's counterclaims, meritorious or not, are time-barred as a matter of law.

The limitations question, in turn, has generated two separate strands of argument in this litigation. The dominant strand in the district court proceedings, and the one the MFA now focuses on, concerns the accrual of Seger-Thomschitz's causes of action under Massachusetts law. The district court held that the claims accrued "decades before the filing of this lawsuit," and in any event no later than

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[6] One commentator explains that "[s]orting the legitimate transaction from the illegitimate sixty or seventy years later can be extremely difficult":

> Much art was Aryanized, or subjected to forced sales for prices significantly below market value (if any value ever actually materialized for the seller), and some art was sold at infamous "Jew auctions," which are now universally recognized as illegal. But some sales before April 26, 1938, were legitimate and for fair market value or close thereto. Some people were able to voluntarily sell art on the open market, albeit not much modern art after Hitler declared it "degenerate". Additionally, because so many Jews were compelled to forfeit "flight asset[s]" to pay for their passage out of the Reich, the European art market reflected depressed prices.

Jennifer Anglim Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 Or. L. Rev. 37, 49-50 (2009). *Cf. Schoeps v. Museum of Modern Art*, 594 F. Supp. 2d 461, 466 (S.D.N.Y. 2009) (holding, on facts similar to those presented here, that a triable issue existed as to whether the original transfer was voluntary under German law); *Bakalar v. Vavra*, No. 08-5119, 2010 WL 3435375, at *10-15 (2d Cir. Sept. 2, 2010) (Norman, J., separately concurring) (discussing some of the relevant legal considerations under New York law).

the fall of 2003, when Seger-Thomschitz was apprised of Vienna's decision to return the Romako works. *Museum of Fine Arts*, 2009 WL, 6506658, at *8-9. Seger-Thomschitz argues that there is a triable issue as to when she and/or the Reichels were on notice of the basis for the claims, and she complains that the district court should have allowed her more time to conduct discovery. She also contends that even if the district court correctly applied the Massachusetts discovery rule, the circumstances of this case justify displacing the Massachusetts limitations period with a federal common law laches defense. We address each of these arguments in turn.

A. Massachusetts Discovery Rule

The district court and the parties have limited the breadth of the statute of limitations inquiry in three important ways. First, the district court held that the law of Massachusetts, rather than the law of Austria, New York, or some other jurisdiction, governs both the merits of Seger-Thomschitz's counterclaims and the limitations period applicable to those claims. The parties do not contest that determination on appeal. Second, the district court held that, under Massachusetts law, Seger-Thomschitz's counterclaims are governed by the three-year limitations period applicable to tort and replevin actions, Mass. Gen. Laws ch. 260, § 2A. Although Seger-Thomschitz argued below that the six-year period applicable to contract claims should apply, she has abandoned that position on appeal and so has conceded that the three-year period applies.

Third, under the applicable statute of limitations, "actions of tort, actions of contract to recover

for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues." Mass. Gen. Laws ch. 260, § 2A. The district court analyzed the accrual question by applying the so-called discovery rule, which provides that "a cause of action accrues when 'an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury.'" *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 903 (Mass. 2009) (quoting *Bowen v. Eli Lilly Co.*, 557 N.E.2d 739, 741 (Mass. 1990)). Although the discovery rule is not the only possible way of measuring accrual in a missing art case,[7] the parties do not contest the district court's decision to apply it here. We therefore follow the district court's lead in applying the discovery rule to Seger-Thomschitz's counterclaims.

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[7] A number of alternative approaches are noted in Ashton Hawkins et al., *A Tale of Two Innocents: Creating an Equitable Balance Between the Rights of Former Owners and Good Faith Purchasers of Stolen Art*, 64 Fordham L. Rev. 49, 77 & nn. 174-75 (1995), and Steven A. Bibas, Note, *The Case Against Statutes of Limitations for Stolen Art*, 103 Yale L.J. 2437, 2440-48 (1994). They include variations on the doctrine of adverse possession, rules tying accrual to the date the possessor acquired the property, and the rule that a cause of action for conversion against an innocent purchaser does not accrue until there has been a demand for, and a refusal to surrender, the property. New York explicitly follows the demand and refusal rule. *See Solomon R. Guggenheim Found. v. Lubell*, 569 N.E.2d 426, 429 (N.Y. 1991). The case law suggests that such a rule could potentially be applied in Massachusetts as well. *See Atl. Fin. Corp. v. Galvam*, 39 N.E.2d 951, 952 (Mass. 1942); *In re Halmar Distribs., Inc.*, 968 F.2d 121, 129 (1st Cir. 1992); *see also* W. Page Keeton et al., *Prosser and Keeton on Torts* 93-94 (5th ed. 1984). Because Seger-Thomschitz's concession removes these issues from our consideration, we do not express any opinion on them.

The party seeking the benefit of the discovery rule has the burden of showing (1) that she lacked actual knowledge of the basis for her claim and (2) that her lack of knowledge was objectively reasonable. *Koe v. Mercer*, 876 N.E.2d 831, 836 (Mass. 2007). Courts applying the discovery rule in missing art cases have tested the reasonableness of the claimant's lack of knowledge by asking whether the claimant. "acted with due diligence in pursuing his or her personal property." *O'Keeffe v. Snyder*, 416 A.2d 862, 872 (N.J. 1980); *accord Autocephalous Greek-Orthodox Church v. Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 288-89 (7th Cir. 1990); *Erisoty v. Rizik*, No. 93-6215, 1995 WL 91406, at *10 (E.D. Pa. Feb. 23, 1995).

In contrast to many missing art cases, the location of the Painting has been no secret in this case. The Painting has long been on public display at the MFA, a major international museum. Since 2000, the MFA has listed the Painting in a provenance database on its publicly accessible website. Several published books and at least one catalogue raisonné of Kokoschka's works[8] identify the MFA as the current holder of the Painting. Finally, the Getty Provenance Index, a database of provenance information that has been searchable on the internet since 1999, notes that the Painting is part of the MFA's collection. There is no question that the MFA's possession of the Painting has long been discoverable with minimal diligence.

Then there is the question of when the Reichel family should have known that Dr. Reichel formerly owned the Painting and gave it up under conditions

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[8] As the district court explained, a catalogue raisonné is a comprehensive scholarly listing of an artist's works. *Museum of Fine Arts*, 2009 WL 6506658, at *2 n.4.

that may have amounted to duress. The district court held that Hans, Raimund, and Malvine Reichel "had ample notice of any possible claim to the Painting decades before the filing of this lawsuit." *Museum of Fine Arts*, 2009 WL 6506658, at *8. Among other things, the district court noted that Raimund wrote several letters to art historians during the 1980s in which he indicated that he remembered the Painting and knew the details of its transfer to Kallir. *See id.* at *7-8. That knowledge, plus the fact that the Reichel family sought compensation for some artworks but not the Painting, led the district court to conclude that the family's failure to lay claim to the Painting was not due to ignorance about the availability of restitution. *Id.* at *7, 8 n.11.

There is also the separate question of Seger-Thomschitz's knowledge of the Painting, an issue somewhat obscured by her motion to amend her counterclaim. She sought leave to amend while the motion for summary judgment was pending in the district court, alleging that Kallir fraudulently concealed the details of Dr. Reichel's sale of the Painting from the Reichel family. She also filed an affidavit In accordance with Federal Rule of Civil Procedure 56(f) asking for additional time to conduct discovery on the fraudulent concealment theory. The district court denied the motion, concluding that summary judgment was warranted even if the allegations of fraudulent concealment were true. *See Museum of Fine Arts*, 2009 WL 6506655, at *9-10.

As Seger-Thomschitz acknowledged at oral argument, there is no allegation that Kallir fraudulently concealed anything from her. Hence the fraudulent concealment claim does not affect the knowledge of Seger-Thomschitz herself, which the

district court cited as an alternative basis for granting summary judgment. We focus our analysis on that ruling.

By her own admission, Seger-Thomschitz "learned that the Nazis had confiscated artworks from Oskar Reichel in the Fall of 2003 when the Museums of Vienna contacted her concerning their intent to return to her as the sole heir of Oskar Reichel four artworks in their collection by the artist Anton Romako." That information put her on notice that she might have a claim to other artworks that were previously owned by Dr. Reichel. She retained a Viennese attorney that same year "for purposes of handling the restitution of any artworks that Oskar Reichel may have lost due to Nazi persecution." Yet she did not demand the return of the Painting from the MFA until March 12, 2007, well over three years after she was contacted about the Romakos.

As we have already noted, and as the district court explained more fully, provenance information for the Painting, including the fact of Dr. Reichel's prior ownership, was available on the MFA's website, in the Getty Provenance Index, in several catalogues raisonnés of Kokoschka's works, and in a book published in Vienna in 2003 that "included a picture of the Painting, traced its provenance from Reichel to the MFA, included a transcription of Reichel's April 1938 property declaration listing the Painting[,] and described the sale of the work to Kallir and its subsequent exhibition in the United States at the Galerie St. Etienne." *Museum of Fine Arts*, 2009 WL 6506658, at *9. In addition, Dr. Reichel's property declaration has been directly accessible to the public since 1998. Although the availability of some of these sources may not have been obvious to Seger-Thomschitz, who is a nurse

with no specialized training in Nazi-era art claims, that fact does not excuse her delay. It was her burden under Massachusetts law to discover from the relevant professional communities whether she had a cognizable legal claim. *Doe v. Harbor Sch., Inc.*, 843 N.E.2d 1058, 1067 n.13 (Mass. 2006). Indeed, she had an attorney available to her in 2003 who could have helped her discover the basis for her claim.

Seger-Thomschitz argues that "because the discovery rule is fact intensive, juries—rather than the court—should decide when plaintiffs knew or should have been aware of their claims." That argument does not get her far. The issue of what a party knew or should have known is often a question of fact to be submitted to the jury. *Mercer*, 876 N.E.2d at 836. However, summary judgment may be granted on a limitations defense if there is no *genuine* dispute about the material facts, and the record evidence would not permit a reasonable jury to return a verdict for the nonmoving party. *See Genereux v. Am. Beryllia Corp.*, 577 F.3d 350, 361 (1st Cir. 2009); *Doyle v. Shubs*, 905 F.2d 1, 1 (1st Cir. 1990) (per curiam). *Cf. Mercer*, 876 N.E.2d at 836 (applying a similar standard under Massachusetts Rule of Civil Procedure). That is the case here.

Seger-Thomschitz did not submit her own affidavit to explain what she was doing between 2003 and 2007, a curious omission given that she is in the best position to account for that period. Her American attorney, whom she retained in 2006, submitted an affidavit in connection with her Rule 56(f) request in which he stated that Seger-Thomschitz and her Austrian attorney "had come to believe that all of the artwork that Oskar Reichel lost due to Nazi persecution had remained in Vienna

and had been restituted." Of course, in light of all the publicly available information about the provenance of the Painting, a mistake of that sort does not delay the commencement of the limitations period. Any reasonable jury confronted with the summary judgment record would conclude that Seger-Thomschitz's causes of action accrued no later than the fall of 2003, when she learned that the Nazis had confiscated artworks from Dr. Reichel, and could then, with reasonable diligence, have discovered her claim to the Painting. Because she did not make a demand on the MFA until March 12, 2007, more than three years after her causes of action accrued, summary judgment was properly granted on the MFA's limitations defense.

B. Federal Preemption

Seger-Thomschitz argues in the alternative that the Massachusetts statute of limitations should not be applied at all. She contends that her case implicates important federal interests, and so should be governed by federal timeliness principles based in equity rather than the more rigid Massachusetts limitations period.

1. MFA's Tax-Exempt Status

In the district court and in her opening brief on appeal, Seger-Thomschitz focused much of her preemption argument on the MFA's status as a tax-exempt organization under section 501(c) (3) of the Internal Revenue Code, 26 U.S.C. § 501(c) (3). She argues that the application of a state limitations period in this case would frustrate the "many discrete and compelling federal interests that inhere when judicial claims to recover Nazi-confiscated artworks are brought against U.S. tax-exempt public

trustees such as the MFA." In lieu of the Massachusetts limitations period, she would have us apply the more flexible doctrine of laches as a matter of federal common law, thereby placing the burden on the MFA to prove the lack of diligence of a claimant such as Seger-Thomschitz and the prejudice experienced by the MFA because of Seger-Thomschitz's delay in asserting her claims.[9] The logic of her position would entail displacing state limitations periods in favor of a federal laches rule whenever a claim for restitution of a Nazi-era artwork was made against a tax-exempt organization.

The Supreme Court has warned that the judiciary should create special federal common law rules in "few and restricted" cases. *O'Melveny & Myers v. FDIC*, 312 U.S. 79, 87 (1994) (internal citations and quotation marks omitted). "'Whether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts." *Atherton v. FDIC*, 519 U.S. 213, 218 (1997) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). To justify the application of a federal common law rule, the proponent must typically show that there is a "significant conflict between some federal policy or interest and the use of state law." *Id.* (internal quotation marks omitted).

Seger-Thomschitz contends that the federal government has a compelling interest in "ensuring that charitable organizations that operate as tax exempt entities provide the public with the benefits

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[9] "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961).

for which their tax exemptions were granted." Tax-exempt museums, in her view, have "undermine[d] the rationale for their tax exemptions" by consistently failing to investigate the provenance of the artworks they acquire, thereby facilitating commerce in stolen artworks and other contraband. Without further elaboration, she concludes, "Federal courts therefore are empowered to formulate appropriate rules of accrual in lawsuits seeking to reclaim Nazi-confiscated artworks in the possession of U.S. tax-exempt museums that will encourage these museums to operate lawfully."

On this record, Seger-Thomschitz's argument asks too much of the federal courts and the federal tax code. Tax-exempt organizations, no less than non-exempt organizations, are already subject to applicable state law. *See, e.g.*, *Abramian v. President & Fellows of Harvard Coll.*, 731 N.E.2d 1075 (Mass. 2000) (upholding judgment against tax-exempt university under state employment law). Indeed, as the MFA notes, its trustees are subject to common law fiduciary duties relevant to the accusations of wrongdoing that Seger-Thomschitz has made in this case. The principal distinguishing characteristic of a section 501(c) (3) organization is that, by "legislative grace," it is not required to pay federal taxes on its income.[10] *IHC Health Plans, Inc. v. Comm'r*, 325 F.3d 1188, 1193-94 (10th Cir. 2003) (internal quotation marks omitted).

Although 501(c)(3) status is conditioned on the organization's adherence to certain federally prescribed standards, *see Bob Jones Univ. v. United States*, 461 U.S. 574, 592 (1983), these standards do

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[10] An important collateral benefit is that donations to a 501(c)(3) organization are tax-deductible. *See Bob Jones Univ. v. Simon*, 416 U.S. 725, 727-28 (1974).

not justify a free-ranging superintendence by the federal courts. If a 501(c)(3) organization fails to meet its obligations under the tax code, the law provides a remedy: the organization's tax-exempt status can be revoked. *See* Rev. Proc. 2010-9, 2010-2 I.R.B. 258; *Branch Ministries v. Rossotti*, 211 F.3d 137, 141-42 (D.C. Cir. 2000). In addition, egregious abusers of section 501(c)(3) may be subject to civil or criminal penalties. *See, e.g., United States v. Fumo*, 628 F. Supp. 2d 573, 593-95 (E.D. Pa. 2007). The federal interest in ensuring that tax-exempt organizations "demonstrably serve and be in harmony with the public interest," *Bob Jones Univ.*, 461 U.S. at 592, is adequately protected through these mechanisms and others. We perceive no need to create additional federal common law rules to punish and deter bad behavior by tax-exempt organizations, as Seger-Thomschitz proposes.

In sum, Seger-Thomschitz has not shown that application of the Massachusetts statute of limitations to the Massachusetts causes of action in this case would cause a "significant conflict with, or threat to," the federal interests and policies embodied in section 501(c)(3). *Atherton*, 519 U.S. at 225. We therefore decline her invitation to replace, on that basis, the Massachusetts limitations period with a federal common law laches defense.

2. Foreign Affairs Preemption

Seger-Thomschitz also argues that the Massachusetts statute of limitations should be set aside because it conflicts with the federal government's foreign policy.[11] She grounds her argument in

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[11] The MFA contends that Seger-Thomschitz's foreign affairs preemption argument is forfeited because it was raised for the first time in her reply brief. That is not correct. Seger-

a federal statute and several international declarations signed by the executive branch that touch on the subject of Nazi-confiscated art. She correctly recognizes that the statute and the declarations are merely hortatory, and so do not create any substantive legal rules capable of directly preempting state law. *See Hawaii v. Office of Hawaiian Affairs*, 129 S. Ct. 1436, 1443 (2009). Nevertheless, she argues that they constitute evidence of a federal policy disfavoring the application of rigid limitations periods to claims for Nazi-looted artwork. That federal policy, she contends, is itself capable of preempting the Massachusetts statute of limitations.

In support of her argument, Seger-Thomschitz relies on *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003). The Supreme Court held in *Garamendi* that "state law must give way" when it is in "clear conflict" with an "express federal policy" in the foreign affairs context. 539 U.S. at 421, 425. At issue was California's Holocaust Victim Insurance Relief Act (HVIRA), a law that required insurance companies doing business in the state to disclose information about policies sold in Europe during the Nazi era. *Id.* at 401. A group of insurers challenged the law on the ground that it interfered with the President's policy, expressed in executive agreements and statements by executive branch officials, encouraging voluntary settlement of Nazi-era insurance claims through the auspices of the International Commission on Holocaust Era Insurance Claims. *Id.* at 413, 421. The Supreme Court agreed, concluding that California's aggressive

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Thomschitz specifically argued for foreign affairs preemption in her opening brief. She then developed that argument further in her reply brief. There was no forfeiture.

disclosure requirements were an "obstacle to the success of the National Government's chosen 'calibration of force' in dealing with the Europeans using a voluntary approach." *Id.* at 425 (citation omitted). The Court held that the "clear conflict" between the state statute and an "express federal policy" was sufficient to justify preemption. *Id.* It added:

> If any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA.

Id.

We conclude that *Garamendi* is inapposite for two reasons.[12] First, there is no comparably express federal policy bearing on the issues in this case. Second, even if there were such a policy, the Massachusetts statute of limitations would not be in clear conflict with it.

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[12] We recognize that the Supreme Court's decision in *Medellín v. Texas*, 552 U.S. 491 (2008), may have cast doubt on the continuing vitality of *Garamendi*. *See, e.g.*, A. Mark Weisburd, *Medellín, the President's Foreign Affairs Power and Domestic Law*, 28 Penn St. Int'l L. Rev. 595, 625 (2010) ("One fairly clear consequence of *Medellín* is that the very broad language used in *American Ins. Ass'n v. Garamendi* no longer carries weight." (footnote omitted)). *But see In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 119 n.2 (2d Cir. 2010) (concluding that *Medellín* is consistent with a broad understanding of *Garamendi*); *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1059 (9th Cir. 2009) (acknowledging *Medellín* but nonetheless applying *Garamendi* broadly). We express no opinion on that issue. Even if the *Garamendi* doctrine retains its full force, it does not aid Seger-Thomschitz in this case.

As evidence of an express federal policy disfavoring the application of limitations periods to claims for Nazi-looted artwork, Seger-Thomschitz directs our attention to four sources of law: the Holocaust Victims Redress Act of 1998, the Washington Conference Principles on Nazi-Confiscated Art, the Vilnius Forum Declaration, and the Terezín Declaration on Holocaust Era Assets and Related Issues.[13] The Holocaust Victims Redress Act is a federal statute, and the other three documents are executive agreements—international declarations signed by the executive branch on behalf of the United States, but not approved by the Senate (as treaties) or by the entire Congress (as congressional-executive agreements).

The four documents are, for the most part, phrased in general terms evincing no particular hostility toward generally applicable statutes of limitations. The Holocaust Victims Redress Act, for example, merely expresses the "sense of the Congress" that "all governments should undertake good faith efforts to facilitate the return" of Nazi-confiscated property. Pub. L. No. 105-158, § 202, 112 Stat. 15, 17-18 (1998). Similarly, the Washington

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[13] Seger-Thomschitz also relies on what she characterizes as "statements of high ranking U.S. officials." However, the first statement—remarks by former Ambassador Stuart Eisenstadt at the Prague Holocaust Era Assets Conference—was delivered in the speaker's personal capacity and so does not represent the position of the executive branch. The second statement—remarks by Ambassador J. Christian Kennedy at the State Department in 2009—was stricken from the record for procedural reasons and is not otherwise publicly available. Neither statement can be used to support Seger-Thomschitz's preemption argument, and she has not directed our attention to any other statements of executive branch policy akin to the official letters and testimony that the Supreme Court considered in *Garamendi*.

Principles state that when Nazi-confiscated artwork is identified, "steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case." U.S. Dep't of State, The Washington Conference on Holocaust Era Assets, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), http://www.state.gov/www/regions/eur/holocaust/heacappen.pdf. The Vilnius Forum Declaration "asks all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust" and recognizes that "solutions may vary according to the differing legal systems among countries and the circumstances surrounding a specific case." Vilnius International Forum on Holocaust-Era Looted Cultural Assets, Vilnius Forum Declaration (Oct. 5, 2000), *available at* http://www.lootedartcommission.com/vilnius-forum. We discern no express federal policy disfavoring statutes of limitations in the general language of those documents.

The Terezín Declaration is more on point. The parties to the Declaration stated, in relevant part:

> [W]e urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural

> property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

Prague Holocaust Era Assets Conference, Terezín Declaration (June 30, 2009), http://www.holocausteraassets.eu/program/conference-proceedings/declarations. This statement reflects a clear preference that Nazi-era art disputes should be resolved "based on the facts and the merits" rather than on legal technicalities. Nevertheless, the language is too general and too hedged to he used as evidence of an express federal policy disfavoring statutes of limitations. A preference for the resolution of claims on the merits does not mean that all time limitations should be abandoned. Moreover, the Terezín Declaration recognizes that "various legal provisions that may impede the restitution of art and cultural property" will continue to be applied. The proposed solution is for governments applying such provisions to "consider all relevant issues... in order to achieve just and fair solutions." None of this language is sufficiently clear and definite to constitute evidence of an express federal policy against the applicability of state statutes of limitations to claims for the recovery of lost, stolen, or confiscated art.

Even if there were an express federal policy disfavoring overly rigid timeliness requirements, the Massachusetts statute of limitations would not be in "clear conflict" with that policy. The Supreme Court indicated in *Garamendi* that it is appropriate to "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." 539 U.S. at 420. The enactment of generally applicable statutes of

limitations is a traditional state prerogative, and states have a substantial interest in preventing their laws from being used to pursue stale claims. In that sense, the statute in this case is unlike the law in *Garamendi*, which "effectively single[d] out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." *Id.* at 425-26 (distinguishing HVIRA from a "generally applicable 'blue sky' law").

Moreover, as our earlier discussion makes clear, the Massachusetts statute of limitations, as tempered by the discovery rule, is flexible and sensitive to the facts of each case. It strikes a reasonable balance between restitution and repose, permitting a claimant who has diligently pursued her rights to have her day in court. Indeed, because a claimant in a missing or confiscated art case may be able to defeat summary judgment by demonstrating that she diligently pursued her property, the Massachusetts discovery rule may not he that different in practice from the federal common law laches defense that Seger-Thomschitz would like us to apply. The Massachusetts statute of limitations is not preempted under *Garamendi*. *Accord Dunbar v. Seger-Thomschitz*, No. 09-30717, 2010 WL 3292678, at *4 (5th Cir. Aug. 20, 2010) (rejecting a similar argument).

III.

Statute of limitations defenses, even when tempered by a discovery rule, may preclude otherwise meritorious claims. Inescapably, statutes of limitations are somewhat arbitrary in their choice of a particular time period for asserting a claim. Yet statutes of limitations cannot be fairly characterized as technicalities, and they serve important interests:

> Statutes of limitations, which are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979) (internal quotation marks and citations omitted).

Precisely because they do not address the merits of a claim, statutes of limitations do not vindicate the conduct of parties who successfully invoke them. Although we make no judgment about the legality of the MFA's acquisition of the Painting in 1973, we note the MFA's own disclosure that, when confronted with Seger-Thomschitz's claim, it initiated a provenance investigation for the Painting that it had not done before. The timing of that investigation may have been legally inconsequential in this case. However, for works of art with unmistakable roots in the Holocaust era, museums would now be well-advised to follow the guidelines of the American Association of Museums: "[m]useums should take all reasonable steps to resolve the Nazi-era provenance status of objects before acquiring them for their

collections—whether by purchase, gift, bequest, or exchange." American Association of Museums, Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era (Nov. 1999), http://www.aam-us.org/museumresources/ethics/nazi_guidelines.cfm.

AFFIRMED.

United States Constitution
Article VI, Clause 2

Article VI, Clause 2 of the United States Constitution prescribes as follows:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding."

U.S. Department of State
Diplomacy in Action

Prague Holocaust Era Assets Conference: Terezin Declaration

BUREAU OF EUROPEAN AND
EURASIAN AFFAIRS
June 30, 2009

Upon the invitation of the Prime Minister of the Czech Republic we the representatives of 46 states listed below met this day, June 30, 2009 in Terezin, where thousands of European Jews and other victims of Nazi persecution died or were sent to death camps during World War II. We participated in the Prague Holocaust Era Assets Conference organized by the Czech Republic and its partners in Prague and Terezin from 26-30 June 2009, discussed together with experts and non-governmental organization (NGO) representatives important issues such as Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution, Immovable Property, Jewish Cemeteries and Burial Sites, Nazi- Confiscated and Looted Art, Judaica and Jewish Cultural Property, Archival Materials, and Education, Remembrance, Research and Memorial Sites. We join affirming in this

Terezin Declaration on Holocaust Era Assets and Related issues

- Aware that Holocaust (Shoah) survivors and other victims of Nazi persecution have reached an advanced age and that it is imperative to respect their personal dignity and to deal with their social welfare needs, as an issue of utmost urgency,

- Having in mind the need to enshrine for the benefit of future generations and to remember forever the unique history and the legacy of the Holocaust (Shoah), which exterminated three fourths of European Jewry, including its premeditated nature as well as other Nazi crimes,
- Noting the tangible achievements of the 1997 London Nazi Gold Conference, and the 1998 Washington Conference on Holocaust-Era Assets, which addressed central issues relating to restitution and successfully set the stage for the significant advances of the next decade, as well as noting the January 2000 Stockholm Declaration, the October 2000 Vilnius Conference on Holocaust Era Looted Cultural Assets,
- Recognizing that despite those achievements there remain substantial issues to be addressed, because only a part of the confiscated property has been recovered or compensated,
- Taking note of the deliberations of the Working Groups and the Special Session on Social Welfare of Holocaust Survivors and their points of view and opinions which surveyed and addressed issues relating to the Social Welfare of Holocaust Survivors and other Victims of Nazi Persecution, Immovable Property, Nazi Confiscated Art, Judaica and Jewish Cultural Property, Holocaust Education, Remembrance and Research, which can be found on the weblink for the Prague Conference and will be published in the Conference Proceedings,
- Keeping in mind the legally non-binding nature of this Declaration and moral responsibilities thereof, and without prejudice to applicable international law and obligations,
1. Recognizing that Holocaust (Shoah) survivors and other victims of the Nazi regime and its collaborators

suffered unprecedented physical and emotional trauma during their ordeal, the Participating States take note of the special social and medical needs of all survivors and strongly support both public and private efforts in their respective states to enable them to live in dignity with the necessary basic care that it implies.

2. Noting the importance of restituting communal and individual immovable property that belonged to the victims of the Holocaust (Shoah) and other victims of Nazi persecution, the Participating States urge that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.

3. Recognizing the progress that has been made in research, identification, and restitution of cultural property by governmental and non-governmental institutions in some states since the 1998 Washington Conference on Holocaust-Era Assets and the endorsement of the Washington Conference Principles on Nazi-Confiscated Art, the Participating States affirm an urgent need to strengthen and sustain these efforts in order to ensure just and fair solutions regarding cultural property, including Judaica that was looted or displaced during or as a result of the Holocaust (Shoah).

4. Taking into account the essential role of national governments, the Holocaust (Shoah) survivors' organizations, and other specialized NGOs, the Participating States call for a coherent and more effective approach by States and the international community to ensure the fullest possible, relevant archival access with due respect to national

legislation. We also encourage States and the international community to establish and support research and education programs about the Holocaust (Shoah) and other Nazi crimes, ceremonies of remembrance and commemoration, and the preservation of memorials in former concentration camps, cemeteries and mass graves, as well as of other sites of memory.

5. Recognizing the rise of Anti-Semitism and Holocaust (Shoah) denial, the Participating States call on the international community to be stronger in monitoring and responding to such incidents and to develop measures to combat anti-Semitism.

The Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution

Recognizing that Holocaust (Shoah) survivors and other victims of Nazi persecution, including those who experienced the horrors of the Holocaust (Shoah) as small and helpless children, suffered unprecedented physical and emotional trauma during their ordeal.

Mindful that scientific studies document that these experiences frequently result in heightened damage to health, particularly in old age, we place great priority on dealing with their social welfare needs in their lifetimes. It is unacceptable that those who suffered so greatly during the earlier part of their lives should live under impoverished circumstances at the end.

1. We take note of the fact that Holocaust (Shoah) survivors and other victims of Nazi persecution have today reached an advanced age and that they have special medical and health needs, and we therefore support, as a high priority, efforts to address in their

respective states the social welfare needs of the most vulnerable elderly victims of Nazi persecution – such as hunger relief, medicine and homecare as required, as well as measures that will encourage intergenerational contact and allow them to overcome their social isolation. These steps will enable them to live in dignity in the years to come. We strongly encourage cooperation on these issues.

2. We further take note that several states have used a variety of creative mechanisms to provide assistance to needy Holocaust (Shoah) survivors and other victims of Nazi persecution, including special pensions; social security benefits to non-residents; special funds; and the use of assets from heirless property. We encourage states to consider these and other alternative national actions, and we further encourage them to find ways to address survivors' needs.

Immovable (Real) Property

Noting that the protection of property rights is an essential component of a democratic society and the rule of law,

Acknowledging the immeasurable damage sustained by individuals and Jewish communities as a result of wrongful property seizures during the Holocaust (Shoah),

Recognizing the importance of restituting or compensating Holocaust-related confiscations made during the Holocaust era between 1933-45 and as its immediate consequence,

Noting the importance of recovering communal and religious immovable property in reviving and enhancing Jewish life, ensuring its future, assisting the welfare needs of Holocaust (Shoah) survivors,

and fostering the preservation of Jewish cultural heritage,

1. We urge, where it has not yet been effectively achieved, to make every effort to provide for the restitution of former Jewish communal and religious property by either in rem restitution or compensation, as may be appropriate; and

2. We consider it important, where it has not yet been effectively achieved, to address the private property claims of Holocaust (Shoah) victims concerning immovable (real) property of former owners, heirs or successors, by either in rem restitution or compensation, as may be appropriate, in a fair, comprehensive and nondiscriminatory manner consistent with relevant national law and regulations, as well as international agreements. The process of such restitution or compensation should be expeditious, simple, accessible, transparent, and neither burdensome nor costly to the individual claimant; and we note other positive legislation in this area.

3. We note that in some states heirless property could serve as a basis for addressing the material necessities of needy Holocaust (Shoah) survivors and to ensure ongoing education about the Holocaust (Shoah), its causes and consequences.

4. We recommend, where it has not been done, that states participating in the Prague Conference consider implementing national programs to address immovable (real) property confiscated by Nazis, Fascists and their collaborators. If and when established by the Czech Government, the European Shoah Legacy Institute in Terezin shall facilitate an intergovernmental effort to develop non-binding guidelines and best practices for restitution and compensation of wrongfully seized immovable

property to be issued by the one-year anniversary of the Prague Conference, and no later than June 30, 2010, with due regard for relevant national laws and regulations as well as international agreements, and noting other positive legislation in this area.

Jewish Cemeteries and Burial Sites

Recognizing that the mass destruction perpetrated during the Holocaust (Shoah) put an end to centuries of Jewish life and included the extermination of thousands of Jewish communities in much of Europe, leaving the graves and cemeteries of generations of Jewish families and communities unattended, and

Aware that the genocide of the Jewish people left the human remains of hundreds of thousands of murdered Jewish victims in unmarked mass graves scattered throughout Central and Eastern Europe,

We urge governmental authorities and municipalities as well as civil society and competent institutions to ensure that these mass graves are identified and protected and that the Jewish cemeteries are demarcated, preserved and kept free from desecration, and where appropriate under national legislation could consider declaring these as national monuments.

Nazi-Confiscated and Looted Art

Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of

relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 and as an immediate consequence, and

Recalling the Washington Conference Principles on Nazi-Confiscated Art as endorsed at the Washington Conference of 1998, which enumerated a set of voluntary commitments for governments that were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions,

1. We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well,

2. In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also recommend the establishment of mechanisms to assist claimants and others in their efforts,

3. Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions,

facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

Judaica and Jewish Cultural Property

Recognizing that the Holocaust (Shoah) also resulted in the wholesale looting of Judaica and Jewish cultural property including sacred scrolls, synagogue and ceremonial objects as well as the libraries, manuscripts, archives and records of Jewish communities, and

Aware that the murder of six million Jews, including entire communities, during the Holocaust (Shoah) meant that much of this historical patrimony could not be reclaimed after World War II, and

Recognizing the urgent need to identify ways to achieve a just and fair solution to the issue of Judaica and Jewish cultural property, where original owners, or heirs of former original Jewish owners, individuals or legal persons cannot be identified, while acknowledging there is no universal model,

1. We encourage and support efforts to identify and catalogue these items which may be found in archives, libraries, museums and other government and non-government repositories, to return them to their original rightful owners and other appropriate individuals or institutions according to national law,

and to consider a voluntary international registration of Torah scrolls and other Judaica objects where appropriate, and

2. We encourage measures that will ensure their protection, will make appropriate materials available to scholars, and where appropriate and possible in terms of conservation, will restore sacred scrolls and ceremonial objects currently in government hands to synagogue use, where needed, and will facilitate the circulation and display of such Judaica internationally by adequate and agreed upon solutions.

Archival Materials

Whereas access to archival documents for both claimants and scholars is an essential element for resolving questions of the ownership of Holocaust-era assets and for advancing education and research on the Holocaust (Shoah) and other Nazi crimes,

Acknowledging in particular that more and more archives have become accessible to researchers and the general public, as witnessed by the Agreement reached on the archives of the International Tracing Service (ITS) in Bad Arolsen, Germany,

Welcoming the return of archives to the states from whose territory they were removed during or as an immediate consequence of the Holocaust (Shoah),

We encourage governments and other bodies that maintain or oversee relevant archives to make them available to the fullest extent possible to the public and researchers in accordance with the guidelines of the International Council on Archives, with due regard to national legislation, including provisions on privacy and data protection, while also taking into account the special circumstances created by the

Holocaust era and the needs of the survivors and their families, especially in cases concerning documents that have their origin in Nazi rules and laws.

Education, Remembrance, Research and Memorial Sites

Acknowledging the importance of education and remembrance about the Holocaust (Shoah) and other Nazi crimes as an eternal lesson for all humanity,
Recognizing the preeminence of the Stockholm Declaration on Holocaust Education, Remembrance and Research of January 2000,
Recognizing that the Universal Declaration of Human Rights was drafted in significant part in the realization of the horrors that took place during the Holocaust, and further recognizing the U.N. Convention on the Prevention and Punishment of the Crime of Genocide,
Recalling the action of the United Nations and of other international and national bodies in establishing an annual day of Holocaust remembrance,
Saluting the work of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research (ITF) as it marks its tenth anniversary, and encouraging the States participating in the Prague Conference to cooperate closely with the Task Force, and
Repudiating any denial of the Holocaust (Shoah) and combating its trivialization or diminishment, while encouraging public opinion leaders to stand up against such denial, trivialization or diminishment,
1. We strongly encourage all states to support or establish regular, annual ceremonies of remem-

brance and commemoration, and to preserve memorials and other sites of memory and martyrdom. We consider it important to include all individuals and all nations who were victims of the Nazi regime in a worthy commemoration of their respective fates,

2. We encourage all states as a matter of priority to include education about the Holocaust (Shoah) and other Nazi crimes in the curriculum of their public education systems and to provide funding for the training of teachers and the development or procurement of the resources and materials required for such education.

3. Believing strongly that international human rights law reflects important lessons from history, and that the understanding of human rights is essential for confronting and preventing all forms of racial, religious or ethnic discrimination, including Anti-Semitism, and Anti-Romani sentiment, today we are committed to including human rights education into the curricula of our educational systems. States may wish to consider using a variety of additional means to support such education, including heirless property where appropriate.

4. As the era is approaching when eye witnesses of the Holocaust (Shoah) will no longer be with us and when the sites of former Nazi concentration and extermination camps, will be the most important and undeniable evidence of the tragedy of the Holocaust (Shoah), the significance and integrity of these sites including all their movable and immovable remnants, will constitute a fundamental value regarding all the actions concerning these sites, and will become especially important for our civilization including, in particular, the education of future generations. We, therefore, appeal for broad

support of all conservation efforts in order to save those remnants as the testimony of the crimes committed there to the memory and warning for the generations to come and where appropriate to consider declaring these as national monuments under national legislation.

Future Action

Further to these ends we welcome and are grateful for the Czech Government's initiative to establish the European Shoah Legacy Institute in Terezin (Terezin Institute) to follow up on the work of the Prague Conference and the Terezin Declaration. The Institute will serve as a voluntary forum for countries, organisations representing Holocaust (Shoah) survivors and other Nazi victims, and NGOs to note and promote developments in the areas covered by the Conference and this Declaration, and to develop and share best practices and guidelines in these areas and as indicated in paragraph four of Immovable (Real) Property. It will operate within the network of other national, European and international institutions, ensuring that duplicative efforts are avoided, for example, duplication of the activities of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research (ITF).

Following thé conference proceedings and the Terezin Declaration, the European Commission and the Czech Presidency have noted the importance of the Institute as one of the instruments in the fight against racism, xenophobia and anti-Semitism in Europe and the rest of the world, and have called for other countries and institutions to support and cooperate with this Institute.

To facilitate the dissemination of information, the Institute will publish regular reports on activities related to the Terezin Declaration. The Institute will develop websites to facilitate sharing of information, particularly in the fields of art provenance, immovable property, social welfare needs of survivors, Judaica, and Holocaust education. As a useful service for all users, the Institute will maintain and post lists of websites that Participating States, organizations representing Holocaust (Shoah) survivors and other Nazi victims and NGOs sponsor as well as a website of websites on Holocaust issues.

We also urge the States participating in the Prague Conference to promote and disseminate the principles in the Terezin Declaration, and encourage those states that are members of agencies, organizations and other entities which address educational, cultural and social issues around the world, to help disseminate information about resolutions and principles dealing with the areas covered by the Terezin Declaration.

A more complete description of the Czech Government's concept for the Terezin Institute and the Joint Declaration of the European Commission and the Czech EU Presidency can be found on the website for the Prague Conference and will be published in the conference proceedings.

List of States

1. Albania
2. Argentina
3. Australia
4. Austria
5. Belarus
6. Belgium

7. Bosnia and Herzegovina
8. Brazil
9. Bulgaria
10. Canada
11. Croatia
12. Cyprus
13. Czech Republic
14. Denmark
15. Estonia
16. Finland
17. France
18. FYROM
19. Germany
20. Greece
21. Hungary
22. Ireland
23. Israel
24. Italy
25. Latvia
26. Lithuania
27. Luxembourg
28. Malta
29. Moldova
30. Montenegro
31. The Netherlands
32. Norway
33. Poland
34. Portugal
35. Romania
36. Russia
37. Slovakia
38. Slovenia
39. Spain
40. Sweden
41. Switzerland
42. Turkey

43. Ukraine
44. United Kingdom
45. United States
46. Uruguay

The Holy See *(observer)*
Serbia *(observer)*

Washington Conference Principles On Nazi-Confiscated Art

Released in connection with the Washington Conference on Holocaust-Era Assets, Washington, DC, December 3, 1998

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

I. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.

II. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.

III. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

IV. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.

V. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.

VI. Efforts should be made to establish a central registry of such information.

VII. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.

VIII. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.

IX. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, can not be identified, steps should be taken expeditiously to achieve a just and fair solution.

X. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.

XI. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

Public Law 105-158
105th Congress

An Act

To provide redress for inadequate restitution of assets seized by the United States Government during World War II which belonged to victims of the Holocaust, and for other purposes. (Feb. 13, 1998/[S. 1564])

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [Holocaust Victims Redress Act]

SECTION 1. SHORT TITLE.

This Act may be cited as the "Holocaust Victims Redress Act".

TITLE I—HEIRLESS ASSETS

SEC. 101. FINDINGS AND PURPOSES.

(a) FINDINGS.—The Congress finds as follows:

(1) Among the $198,000,000 in German assets located in the United States and seized by the United States Government in World War II were believed to be bank accounts, trusts, securities, or other assets belonging to Jewish victims of the Holocaust.

(2) Among an estimated $1,200,000,000 in assets of Swiss nationals and institutions which were frozen by the United States Government during World War II (including over $400,000,000 in bank deposits) were assets

whose beneficial owners were believed to include victims of the Holocaust.

(3) In the aftermath of the war, the Congress recognized that some of the victims of the Holocaust whose assets were among those seized or frozen during the war might not have any legal heirs, and legislation was enacted to authorize the transfer of up to $3,000,000 of such assets to organizations dedicated to providing relief and rehabilitation for survivors of the Holocaust.

(4) Although the Congress and the Administration authorized the transfer of such amount to the relief organizations referred to in paragraph (3), the enormous administrative difficulties and cost involved in proving legal ownership of such assets, directly or beneficially, by victims of the Holocaust, and proving the existence or absence of heirs of such victims, led the Congress in 1962 to agree to a lump-sum settlement and to provide $500,000 for the Jewish Restitution Successor Organization of New York, such sum amounting to 1/6th of the authorized maximum level of "heirless" assets to be transferred.

(5) In June of 1997, a representative of the Secretary of State, in testimony before the Congress, urged the reconsideration of the limited $500,000 settlement.

(6) While a precisely accurate accounting of "heirless" assets may be impossible, good conscience warrants the recognition that the victims of the Holocaust have a compelling moral claim to the unrestituted portion of assets referred to in paragraph (3).

(7) Furthermore, leadership by the United States in meeting obligations to Holocaust victims would strengthen—

(A) the efforts of the United States to press for the speedy distribution of the remaining nearly 6 metric tons of gold still held by the Tripartite Commission for the Restitution of Monetary Gold (the body established by France, Great Britain, and the United States at the end of World War II to return gold looted by Nazi Germany to the central banks of countries occupied by Germany during the war); and

(B) the appeals by the United States to the 15 nations claiming a portion of such gold to contribute a substantial portion of any such distribution to Holocaust survivors in recognition of the recently documented fact that the gold held by the Commission includes gold stolen from individual victims of the Holocaust.

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To provide a measure of justice to survivors of the Holocaust all around the world while they are still alive.

(2) To authorize the appropriation of an amount which is at least equal to the present value of the difference between the amount which was authorized to be transferred to successor organizations to compensate for assets in the United States of heirless victims of the Holocaust and the amount actually paid in 1962 to the Jewish Restitution Successor Organization of New York for that purpose.

(3) To facilitate efforts by the United States to seek an agreement whereby nations with claims against gold held by the Tripartite Commission for the Restitution of Monetary Gold would contribute all, or a substantial portion, of that gold to charitable organizations to assist survivors of the Holocaust.

SEC. 102. DISTRIBUTIONS BY THE TRIPARTITE GOLD COMMISSION.

(a) DIRECTIONS TO THE PRESIDENT.—The President shall direct the commissioner representing the United States on the Tripartite Commission for the Restitution of Monetary Gold, established pursuant to Part III of the Paris Agreement on Reparation, to seek and vote for a timely agreement under which all signatories to the Paris Agreement on Reparation, with claims against the monetary gold pool in the jurisdiction of such Commission, contribute all, or a substantial portion, of such gold to charitable organizations to assist survivors of the Holocaust.

(b) AUTHORITY TO OBLIGATE THE UNITED STATES.—

(1) IN GENERAL—From funds otherwise unobligated in the Treasury of the United States, the President is authorized to obligate subject to paragraph (2) an amount not to exceed $30,000,000 for distribution in accordance with subsections (a) and (b).

(2) CONFORMANCE WITH BUDGET ACT REQUIREMENT.—Any budget authority contained in paragraph (1) shall be effective only to such extent and in such amounts as are provided in advance in appropriation Acts.

SEC. 103. FULFILLMENT OF OBLIGATION OF THE UNITED STATES.

(a) AUTHORIZATION OF APPROPRIATIONS.— There are authorized to be appropriated to the President such sums as may be necessary for fiscal years 1998, 1999, and 2000, not to exceed a total of $25,000,000 for all such fiscal years, for distribution to organizations as may be specified in any agreement concluded pursuant to section 102.

(b) ARCHIVAL RESEARCH.—There are authorized to be appropriated to the President $5,000,000 for archival research and translation services to assist in the restitution of assets looted or extorted from victims of the Holocaust and such other activities that would further Holocaust remembrance and education.

TITLE II—WORKS OF ART

SEC. 201. FINDINGS.

Congress finds as follows:

(1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art.

(2) In the years since World War II, international sanctions against confiscation of works of art have been amplified through such conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.

(3) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.

(4) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

(5) Hence, the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust.

(6) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.

SEC. 202. SENSE OF THE CONGRESS REGARDING RESTITUTION OF PRIVATE PROPERTY, SUCH AS WORKS OF ART.

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Approved February 13, 1998.

LEGISLATIVE HISTORY—S. 1564:
CONGRESSIONAL RECORD:

Vol. 143 (1997): Nov. 13, considered and passed Senate.

Vol. 144 (1998): Jan. 27, considered and passed House.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 34 (1998).

Feb. 13, Presidential statement.

26 U.S.C.A. § 501
I.R.C.§ 501
Effective: March 30, 2010
United States Code Annotated Currentness
Title 26. Internal Revenue Code (Refs & Annos)
Subtitle A. Income Taxes (Refs & Annos)
Chapter 1. Normal Taxes and Surtaxes (Refs & Annos)
Subchapter F. Exempt Organizations (Refs & Annos)
Part I. General Rule (Refs & Annos)
§ 501. Exemption from tax on corporations, certain trusts, etc.

(a) Exemption from taxation.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

(b) Tax on unrelated business income and certain other activities.—An organization exempt from taxation under subsection (a) shall be subject to tax to the extent provided in parts II, III, and VI of this subchapter, but (notwithstanding parts II, III, and VI of this subchapter) shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

(c) List of exempt organizations.—The following organizations are referred to in subsection (a):

(1) Any corporation organized under Act of Congress which is an instrumentality of the United States but only if such corporation—

(A) is exempt from Federal income taxes—

(i) under such Act as amended and supplemented before July 18, 1984, or

(ii) under this title without regard to any provision of law which is not contained in this title and which is not contained in a revenue Act, or

(B) is described in subsection (1).

(2) Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section. Rules similar to the rules of subparagraph (G) of paragraph (25) shall apply for purposes of this paragraph.

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 C.F.R. § 1.501(c)(3)-1
Treas. Reg. § 1.501(c)(3)-1
Effective: April 29, 2008
Code of Federal Regulations Currentness
Title 26. Internal Revenue
Chapter I. Internal Revenue Service, Department of the Treasury
Subchapter A. Income Tax
Part 1. Income Taxes (Refs & Annos)
Normal Taxes and Surtaxes
Exempt Organizations
General Rule

§ 1.501(c)(3)-1 Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

(a) Organizational and operational tests.

(1) In order to be exempt as an organization described in section 501(c)(3), an organization must be both organized and operated exclusively for one or more of the purposes specified in such section. If an organization fails to meet either the organizational test or the operational test, it is not exempt.

(2) The term exempt purpose or purposes, as used in this section, means any purpose or purposes specified in section 501(c)(3), as defined and elaborated in paragraph (d) of this section.

(b) Organizational test—

(1) In general.

(i) An organization is organized exclusively for one or more exempt purposes only if its articles of organization (referred to in this section as its articles) as defined in subparagraph (2) of this paragraph:

(a) Limit the purposes of such organization to one or more exempt purposes; and

(b) Do not expressly empower the organization to engage, otherwise than as an insubstantial part of its activities, in activities which in themselves are not in furtherance of one or more exempt purposes.

(ii) In meeting the organizational test, the organization's purposes, as stated in its articles, may be as broad as, or more specific than, the purposes stated in section 501(c)(3). Therefore, an organization which, by the terms of its articles, is formed for literary and scientific purposes within the meaning of section 501(c)(3) of the Code shall, if it otherwise meets the requirements in this paragraph, be considered to have met the organizational test. Similarly, articles stating that the organization is created solely to receive contributions and pay them over to organizations which are described in section 501(c)(3) and exempt from taxation under section 501(a) are sufficient for purposes of the organizational test. Moreover, it is sufficient if the articles set for the

purpose of the organization to be the operation of a school for adult education and describe in detail the manner of the operation of such school. In addition, if the articles state that the organization is formed for charitable purposes, such articles ordinarily shall he sufficient for purposes of the organizational test (see subparagraph (5) of this paragraph for rules relating to construction of terms).

(iii) An organization is not organized exclusively for one or more exempt purposes if its articles expressly empower it to carry on, otherwise than as an insubstantial part of its activities, activities which are not in furtherance of one or more exempt purposes, even though such organization is, by the terms of such articles, created for a purpose that is no broader than the purposes specified in section 501(c)(3).

Thus, an organization that is empowered by its articles to engage in a manufacturing business, or to engage in the operation of a social club does not meet the organizational test regardless of the fact that its articles may state that such organization is created for charitable purposes within the meaning of section 501(c)(3) of the Code.

(iv) In no case shall an organization be considered to he organized exclusively for one or more exempt purposes, if, by the terns of its articles, the purposes for which such organization is created are broader

than the purposes specified in section 501(c)(3). The fact that the actual operations of such an organization have been exclusively in furtherance of one or more exempt purposes shall not be sufficient to permit the organization to meet the organizational test. Similarly, such an organization will not meet the organizational test as a result of statements or other evidence that the members thereof intend to operate only in furtherance of one or more exempt purposes.

(v) An organization must, in order to establish its exemption, submit a detailed statement of its proposed activities with and as a part of its application for exemption (see paragraph (b) of § 1.501(a)-1).

(2) Articles of organization. For purposes of this section, the term articles of organization or articles includes the trust instrument, the corporate charter, the articles of association, or any other written instrument by which an organization is created.

(3) Authorization of legislative or political activities. An organization is not organized exclusively for one or more exempt purposes if its articles expressly empower it:

(i) To devote more than an insubstantial part of its activities to attempting to influence legislation by propaganda or otherwise; or

(ii) Directly or indirectly to participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of or in opposition to any candidate for public office; or

(iii) To have objectives and to engage in activities which characterize it as an action organization as defined in paragraph (c)(3) of this section.

The terms used in subdivisions (i), (ii), and (iii) of this subparagraph shall have the meanings provided in paragraph (c)(3) of this section. An organization's articles will not violate the provisions of paragraph (b)(3)(i) of this section even though the organization's articles expressly empower it to make the election provided for in section 501(h) with respect to influencing legislation and, only if it so elects, to make lobbying or grass roots expenditures that do not normally exceed the ceiling amounts prescribed by section 501(b)(2)(B) and (D).

(4) Distribution of assets on dissolution. An organization is not organized exclusively for one or more exempt purposes unless its assets are dedicated to an exempt purpose. An organization's assets will be considered dedicated to an exempt purpose, for example, if, upon dissolution, such assets would, by reason of a provision in the organization's articles or by operation of law, be distributed for one or more exempt purposes, or to the

Federal Government, or to a State or local government, for a public purpose, or would be distributed by a court to another organization to be used in such manner as in the judgment of the court will best accomplish the general purposes for which the dissolved organization was organized. However, an organization does not meet the organizational test if its articles or the law of the State in which it was created provide that its assets would, upon dissolution, be distributed to its members or shareholders.

(5) Construction of terms. The law of the State in which an organization is created shall be controlling in construing the terms of its articles. However, any organization which contends that such terms have under State law a different meaning from their generally accepted meaning must establish such special meaning by clear and convincing reference to relevant court decisions, opinions of the State attorney-general, or other evidence of applicable State law.

(6) Applicability of the organizational test. A determination by the Commissioner or a district director that an organization is described in section 501(c)(3) and exempt under section 501(a) will not be granted after July 26, 1959 (regardless of when the application is filed), unless such organization meets the organizational test prescribed by this paragraph. If, before July 27, 1959, an organization has been determined by the Commissioner or district director to be exempt

as an organization described in section 501(c)(3) or in a corresponding provision of prior law and such determination has not been revoked before such date, the fact that such organization does not meet the organizational test prescribed by this paragraph shall not be a basis for revoking such determination. Accordingly, an organization which has been determined to be exempt before July 27, 1959, and which does not seek a new determination of exemption is not required to amend its articles of organization to conform to the rules of this paragraph, but any organization which seeks a determination of exemption after July 26, 1959, must have articles of organization which meet the rules of this paragraph. For the rules relating to whether an organization determined to be exempt before July 27, 1959, is organized exclusively for one or more exempt purposes, see 26 CFR (1939) 39.101(6)-I (Regulations 118) as made applicable to the Code by Treasury Decision 6091, approved August 16, 1954 (19 FR 5167; C.B. 1954-2, 47).

(c) Operational test—

(1) Primary activities. An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

(2) Distribution of earnings. An organization is not operated exclusively for one or more exempt purposes if its net earnings inure in whole or in part to the benefit of private shareholders or individuals. For the definition of the words private shareholder or individual, see paragraph (c) of § 1.501(a)-1.

(3) Action organizations.

(i) An organization is not operated exclusively for one or more exempt purposes if it is an action organization as defined in subdivisions (ii), (iii), or (iv) of this subparagraph.

(ii) An organization is an action organization if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise. For this purpose, an organization will be regarded as attempting to influence legislation if the organization:

(a) Contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation; or

(b) Advocates the adoption or rejection of legislation.

The term legislation, as used in this subdivision, includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure. An organization will not fail to meet the operational test merely because it

advocates, as an insubstantial part of its activities, the adoption or rejection of legislation. An organization for which the expenditure test election of section 501(h) is in effect for a taxable year will not be considered an action organization by reason of this paragraph (c)(3)(ii) for that year if it is not denied exemption from taxation under section 501(a) by reason of section 501(h).

(iii) An organization is an action organization if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office.

The term candidate for public office means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State, or local. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.

(iv) An organization is an action organization if it has the following two characteristics: (a) Its main or primary objective or objectives (as distinguished from its incidental or secondary objectives)

may be attained only by legislation or a defeat of proposed legislation; and (b) it advocates, or campaigns for, the attainment of such main or primary objective or objectives as distinguished from engaging in nonpartisan analysis, study, or research and making the results thereof available to the public. In determining whether an organization has such characteristics, all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered.

(v) An action organization, described in subdivisions (ii) or (iv) of this subparagraph, though it cannot qualify under section 501(c)(3), may nevertheless qualify as a social welfare organization under section 501(c)(4) if it meets the requirements set out in paragraph (a) of § 1.501(c)(4)-1.

M.G.L.A. 260 § 2A
Effective: [See Text Amendments]
Massachusetts General Laws Annotated
Currentness
Part III. Courts, Judicial Officers and Proceedings in Civil Cases (Ch. 211-262)
Title V. Statutes of Frauds and Limitations (Ch. 259-260)
Chapter 260. Limitation of Actions (Refs & Annos)
§ 2A. Tort, contract to recover for personal injuries, and replevin actions

Except as otherwise provided, actions of tort, actions of contract to recover for personal injuries, and actions of replevin, shall be commenced only within three years next after the cause of action accrues.

CREDIT(S)
Added by St.1948, c. 274, § 2. Amended by St.1973, c. 777, § 1.

HISTORICAL AND STATUTORY NOTES
2004 Main Volume
St.1948, c. 274, § 2, was approved May 3, 1948.

Section 3 of St.1948, c. 274, provides:
"This act shall take effect January first, nineteen hundred and fifty, and its provisions shall apply only to causes of action accruing on or after said date."

St.1973, c. 777, § 1, approved Sept. 17, 1973, substituted "three years" for "two years".

Section 4 of St.1973, c. 777, provides:
"This act shall take effect on January first, nineteen hundred and seventy-four, and shall apply to causes of action arising on and after said date."

CROSS REFERENCES

Recovery by employee for personal injuries, see c. 153, § 6.

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No. 10-901

Supreme Court, U.S.
FILED
MAR 30 2011
OFFICE OF THE CLERK

In The

Supreme Court Of The United States

CLAUDIA SEGER-THOMSCHITZ,
Petitioner

v.

MUSEUM OF FINE ARTS, BOSTON,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR REHEARING ON ORDER OF MARCH 7, 2011 DENYING PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION AND SUMMARY OF PETITIONER'S POSITION

The attached letter from the U.S. Department of State (Department) to Petitioner's counsel dated March 8, 2011 (Letter) (appended as Exhibit 1 to his accompanying Declaration) relates an extensive colloquy between Petitioner and the Department as well as the Office of the Solicitor General (Office) of the United States concerning the issues that this case raises, and the interest of U.S. Deputy Solicitor General Edwin S. Kneedler in them. The Letter states that the Department will make known its views in the related *Von Saher v. Norton Simon Art Museum at Pasadena* No. 09-1254 (April 14, 2010), which similarly addresses the relationship under the Supremacy Clause between federal foreign policy to resolve claims for Nazi-era artworks on their substantive merits and state statutes of limitation that either preclude or restrict this objective. The Letter relates that the Department's views in *Von Saher* may bear upon this case.

Because Petitioner can develop an essential argument pertaining to conflict preemption in *Von Saher* that both petitioner and respondent have incentives to disclaim—but which the Court necessarily must consider if it entertains *Von Saher*—the Court should vacate its denial of certiorari in this proceeding, invite the Office to make known its views here as it did in *Von Saher*, and hear *Von Saher* and this proceeding together. The important questions of federal law that this case raises and which the Court should settle—which necessarily complement the parties' arguments in *Von Saher*—further recommend this request.

II. STATEMENT OF FACTS

On March 15, 2011 counsel for Petitioner received the Letter from Attorney-Adviser Brian Israel at the Department responding to an extensive colloquy that Petitioner had conducted about this case both with Mr. Kneedler and the Department. The Letter expressed regret that the Department had delayed in responding to Petitioner's request that the Department and Office file amicus briefs in support of her petitions for writs of certiorari in this proceeding and in the related *Dunbar v. Seger-Thomschitz*, No. 10-839 (Jan. 19, 2011). The Letter acknowledged that the Department had reviewed Petitioner's comprehensive memorandum (Memorandum) asking both the Department and Office to file such briefs. But the Department said that consistent with standard practice, it did not recommend that the Office do so because the United States was not a party and the Court had not invited the Office's views.

The Letter, however, stated that the Office would make known its views in *Von Saher* which the Letter identified as similarly ***"involving Holocaust era art restitution that is also before the Court on a petition for certiorari."*** (Emphasis and italics supplied.) The Letter related that ***"[t]hese views, when they are submitted, may be of interest to you."*** (Emphasis and italics supplied).

The Declaration elaborates the background of Petitioner's colloquy. Briefly, on October 13, 2010 Petitioner sent Mr. Kneedler an eight-page letter discussing how *Dunbar* and *MFA* sabotaged the clear and proactive foreign policy of both Congress and the President to resolve judicial claims for the recovery of Nazi-era artworks on their substantive

merits, and misapplied controlling Court cases, including especially *American Insurance Association v. Garamendi*, 539 U.S. 396 (2003) (Declaration at par. 3). **Petitioner addressed this correspondence specifically to Mr. Kneedler because he had argued the prevailing position of the United States in *Garamendi*.** *Id.*

On or about November 11, 2010 Petitioner sent a second letter to Mr. Kneedler with an accompanying memorandum (Memorandum) of ***nearly 56 pages*** marshalling the long history of U.S. foreign policy—which ***both*** Congress and the Executive Branch have developed—to return Nazi-era artworks to rightful owners and to ensure that claims for the recovery of these materials are decided in an equitable, just and fair manner and are not barred by statutes of limitations (Declaration at pars. 5-8). The Memorandum parsed the Court's controlling decisions which make clear the President enjoys a special authority to settle claims internationally without the approval of Congress, but since Congress had expressly validated the President's discrete claims settlement policy concerning the return of Nazi-era artworks, this policy—as expressed in, ***but not confined by***, the Terezin Declaration of June 30, 2009—enjoyed the full preemptive weight of both political branches responsible for foreign affairs. The Memorandum related that the Executive Branch viewed the Declaration—although legally non-binding and so creating no reciprocally enforceable legal obligations upon the stakeholders—as nonetheless ***important in promoting its international diplomacy*** to accomplish its prescribed goal of having all affected nations resolve claims for the recovery of Nazi-era artworks on their merits. On or about this

same date Petitioner sent the Memorandum to the Department (Declaration at Par. 5).

On December 30, 2010 Mr. Kneedler sent Petitioner an email relating that he had reviewed the Memorandum, and requesting a copy of her petition for certiorari in *Dunbar* (Exhibit 3). Mr. Kneedler said:

> Thank you for the materials you sent, which I did review. Have you filed a certiorari petition? If so, could you please email it to me?

Petitioner complied with this request and later also sent Mr. Kneedler her petition for certiorari in this case. Petitioner did not hear back from the Office and the Court denied her petition in *Dunbar* on February 22, 2011, and in *MFA* on March 7, 2011.

On March 8, 2011 Petitioner emailed Mr. Kneedler and his colleague Michael Dreeben relating that by declining to entertain *MFA* and *Dunbar*, the Court had thwarted U.S. foreign policy concerning how claims for the recovery of Nazi-era artworks should be resolved, and had ***"nailed shut the coffin on Holocaust art restitution"*** everywhere in the U.S. with the possible exception of California and New York (Emphasis and italics original) (Exhibit 4). The email invited any recommendations or suggestions.

On March 15, 2011 Petitioner received the Letter from Mr. Israel (Declaration at par. 14). The Letter closed by offering that "***I hope that this reply is of some assistance to you***." (Emphasis and italics supplied.)

III. ARGUMENT

A. That the Letter Signals an Interest in the Issues that this Proceeding Raises and the Intention of the Office to File an Amicus Brief in *Von Saher* Recommends that the Court Vacate its Denial of Certiorari and Similarly Invite the Office to Make Known its Views

The Letter and related colloquy constitute "intervening circumstances of a substantial or controlling effect" or "other substantial grounds not previously presented" within the meaning of Sup. Ct. R. 44.2. These considerations recommend that the Court vacate its order of March 7, 2011 denying the petition for writ of certiorari and invite the Office of the Solicitor General to make known its views.

The foregoing establishes the following new facts and reasonable inferences that the Court did not consider when it denied the petition:

1. Mr. Kneedler—who argued the successful position of the U.S. in *Garamendi*—believes that this case is sufficiently important to have reviewed ***more than 60 pages of memoranda*** discussing how Congress and the President developed U.S. foreign policy seeking to return Nazi-era artworks to rightful owners, and the necessary controlling preemptive effect of this policy under the Court's relevant decisions (Declaration at pars. 3, 5). After reviewing these materials Mr. Kneedler had ***continuing sufficient interest*** in the relevant issues and in Petitioner's arguments to request a copy of her petition for certiorari in *Dunbar* (Exhibit 3; Declaration at par. 10). Petitioner supplied Mr. Kneedler with

copies of her petitions both in *Dunbar* and in this proceeding (Declaration at par. 11).

2. The State Department also reviewed Petitioner's Memorandum. (Exhibit 1-Letter; Declaration at pars. 5, 14).

3. The Department did not recommend that the Office file an amicus brief because its standard practice is not to do so at the certiorari petition stage unless the U.S. was a party or the Court so invites the Office (Exhibit 1-Letter; Declaration at par. 14).

4. The Department, however, does intend to make known its views in *Von Saher* and regards *Von Saher* as raising questions closely related to those at issue here and in *Dunbar,* as it identifies *Von Saher* as also "involving Holocaust era art restitution" (Exhibit 1-Letter). Moreover, the Department strongly intimates that its views in *Von Saher* are relevant here and in *Dunbar*: ***"[t]hese views, when submitted, may be of interest to you"*** (Emphasis and italics supplied) (Exhibit 1-Letter; Declaration at par. 15).

5. The Department most likely offered the Letter to Petitioner (dated March 8 but postmarked March 14) in response to Petitioner's email of March 8, 2011 to Messrs. Kneedler and Dreeben advising that by declining to review *Dunbar* and *MFA* the Court ***"has nailed shut the coffin on Holocaust art restitution in U.S. courts,"*** that Petitioner could not reasonably envision either claimants or their counsel "tilting at this windmill any further," and inviting any recommendations or suggestions (Emphasis and italics original) (Exhibit 4); Declaration at pars. 13-14).

6. By providing Petitioner the Letter in a most timely and responsive manner, the Office and Department are willing to let the Court know that

they believe that this case is worthwhile, that the Office would make known its views in this proceeding and in *Dunbar* if the Court so requested, and that the views of the Office in *Von Saher* also pertain to this proceeding and to *Dunbar*. In this regard the Letter states ***"I hope this reply is of some assistance to you"*** (Emphasis and italics supplied) (Exhibit 1-Letter; Declaration at par. 15).

Petitioner respectfully submits that these circumstances recommend that the Court vacate its denial of certiorari in this proceeding and in *Dunbar* and invite the Office to make known its views in both cases. The Petition shows that this case has "sweeping significance" for both the foreign affairs preemption doctrine as well as for the clearly defined and vigorously pursued foreign policy of both political branches to resolve claims for the recovery of Nazi-era artworks on their substantive merits. Petition at 18-19. The Letter does not disagree.

Moreover, no harm would result were the Court to vacate its denial of certiorari and invite the Office to submit its views.

B. Because Both this Proceeding and *Von Saher* Address "Complementary" Aspects of The Foreign Affairs Preemption Doctrine Within the Meaning of *American Insurance Association v. Garamendi*, 539 U.S. 396, 420 n.11 (2003) which the Court Necessarily Must Consider in Addressing the Preemption Questions Raised in *Von Saher*—and Petitioner is Uniquely Positioned to Develop an Essential Alternative Preemption Contingency Under the Doctrine of Conflict Preemption that All of the Parties in *Von Saher* Have Incentives to Ignore—The Court Should Consolidate the Two Proceedings and Hear Them Together

Not only does this case present important questions that deserve the Court's reconsideration, these questions necessarily are integrally related to the issues in *Von Saher*. The parties in *Von Saher* have framed for the Court's consideration the question whether a California statue of limitations (Cal. Civ. Proc. § 354.3) extending until 2010 the time for Holocaust victims and their heirs to invoke judicial remedies seeking to recover Nazi-era artworks against California museums is preempted under the "field preemption" doctrine of foreign affairs preemption as the respondent museum maintains,[1] or whether this statute is consonant with—and implements—express federal policy to return Nazi-era artworks to rightful owners as petitioner and *amici* argue.[2]

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[1]Brief in Opposition at 15-18.

[2]Petition for a Writ of Certiorari at 10, 15, 23.

Petitioner is uniquely positioned to advocate a third possibility that the Court inevitably must consider if it entertains *Von Saher*—but which both parties in *Von Saher* need to disavow. This is that the foreign policy of both Congress and the Executive Branch that claims for the recovery of Nazi-era artworks be resolved equitably, in a "just and fair" manner and based upon their substantive merits and ***without regard*** to otherwise applicable statutes of limitations—***when fully developed against the backdrop of the Court's relevant decisions***—may preclude the several states from enacting ***any*** statutes of limitation that ***restrict*** the right of Holocaust victims and their heirs to reclaim Nazi-era artworks. Statutes such as § 354.3 may extend judicial remedies to recover Nazi-era artworks for a limited time ***at the whim of a particular state.*** But these statutes nonetheless may conflict irreconcilably with the overriding federal foreign policy of both political branches that claims to recover Nazi-era artworks should be decided based upon principles of equity and without regard to statutes of limitation ***whatsoever.*** This contingency represents the proverbial "800-pound gorilla" that now lurks silently and furtively in the background of all the parties' arguments both favoring and opposing certiorari in *Von Saher*. But this contingency inevitably will advance to the forefront should the Court ascertain concretely the scope and extent of established federal foreign policy in this area—as it must—if it addresses the several preemption arguments in *Von Saher*.

C. *MFA* Raises Important Questions of Federal Law that the Court Should Settle Within the Meaning of Sup. Ct. R. 10(c) That Also Are Integral to the Court's Consideration of the Foreign Affairs Preemption Issues in *Von Saher*: the Relationship Between Expressly Stated Presidential Policy to Resolve Claims for the Recovery of Holocaust-Era Artworks on Their Substantive Merits and Without Regard to Statutes of Limitation—as Prescribed In, *But Not Defined By*, the Terezin Declaration—and State Statutes of Limitations that Either *Limit* or *Foreclose* this Objective

MFA raises important questions of federal law that the Court should settle which *Von Saher* also implicates:

1. *MFA's failure to give appropriate controlling legal effect to the* ***President's extensive diplomacy*** *to resolve claims for the recovery of Nazi-era artworks on their substantive merits presents an important and unresolved question of federal law that the Court should settle.* The Courts' decisions collectively make clear that when the President seeks to resolve through diplomacy claims emanating from war—and Congress not only has impliedly approved the President's claims settlement authority in general but also has expressly validated the President's **specific claims settlement goal**, both as expressed in an executive agreement and as related

by high ranking Executive Branch officials[3]—the Federal Supremacy Clause preempts state laws that interfere or obstruct the President's diplomatic objectives. But *MFA* ignores all of this and the clear federal policy to resolve claims for the recovery of Holocaust-era artworks on their merits. It says that "there is no comparably express federal policy bearing on the issues in this case. Second, even if there were such a policy, the Massachusetts statute of limitation (three years) would not be in clear conflict with it." 623 F.3d. at 12.

2. *The strength of U.S. foreign policy to restitute Nazi-era artworks vastly exceeds—under the "sliding scale" test of foreign affairs conflict preemption intimated in Garamendi (539 U.S. at 420 n.11)—the importance of comparative state interests.* For the disputed Painting came into Massachusetts in 1972 ***already impressed*** with a ***special character and identity*** as "war booty" under international law and U.S. foreign policy, and so subject to a corresponding obligation of restitution about which the U.S. Government warned U.S. museums in 1946. Massachusetts cannot now defeat U.S. foreign policy to return the Painting merely because the Painting has been there for a period equivalent to its relevant prescriptive period (3 years).

3. *By neglecting to give the expressly stated claims settlement preference of both the President and Congress the preemptive legal effect that the Court's decisions require, MFA undermines the reasonable reliance of both political branches that the federal courts would give their express foreign policy*

---

[3]*Garamendi* confirms that in areas where the President enjoys Constitutional authority to act unilaterally, statements of high ranking executive officials explicating the presidential policy are entitled to "conclusive weight." 539 U.S. at 423. n.14.

preemptive effect over conflicting state law. See Crosby v. National Foreign Trade Council, 530 U.S. 363, 387-88 (2000), "[a] failure to provide for preemption expressly may reflect nothing more than the settled character of implied preemption doctrine that courts will dependably apply." In this regard Ambassador Eizenstat testified before the Helsinki Commission in May 2010 (nearly one year **after** the Terezin Declaration) that the ***Department always has assumed that courts would decide claims for the recovery of higher value artworks***: "most experts believe that claims for high value artworks will inevitably go to the court system, since the value of the artwork would justify the expense of judicial proceedings, whereas lesser value artworks would not." (Declaration at par. 9, App. at A-36.) ***But how can U.S. courts decide such claims if state limitation periods bar them?*** The views of the Office may be most helpful in this regard.

4. *Petitioner's request that the Court implement—through federal common law—the foreign policy of both Congress and the President that claims for the recovery of Nazi-era artworks be resolved equitably and on their merits does not ask the Court to make a single substantive foreign policy or legislative judgment.* Rather, Petitioner merely asks the Court to give appropriate legal effect—in a manner fully consonant with the Court's cases—to the explicitly stated foreign policy preferences of both political branches.

5. *The important questions that MFA and Dunbar raise will not "percolate" in the lower courts, so the Court will not have an opportunity later to address these questions should it so desire.* As Petitioner told the Office in her email of March 8, 2011, by declining the petitions in *MFA* and *Dunbar*

the Court had ***"nailed shut the coffin on Holocaust art restitution"*** and that Petitioner could not reasonably envision any more claimants or their counsel "'tilting at this windmill'" (Emphasis and italics original) (Exhibit 4).

6. *Finally, the Court should not validate by inaction the cynical strategy and conspicuous misconduct by which the MFA—a federal tax-exempt museum—has defended its ownership of the disputed Painting in this proceeding and thereby create a "template" for other U.S. museums to follow* (Petition at 15, 37-40). The result in *MFA* ***makes an absolute mockery*** of the compelling foreign policy ***and related diplomacy*** of both political branches for many years to return Nazi-era artworks to rightful owners.

IV. CONCLUSION

For the foregoing reasons the Court should reconsider and vacate its March 7, 2011 denial of certiorari in this proceeding, invite the Office to make known its views, and grant the petitions for certiorari both in this proceeding and in *Dunbar*.

Respectfully submitted,

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CERTIFICATION UNDER SUPREME COURT RULE 44.2

As Rule 44.2 of the Rules of the Supreme Court requires, I hereby certify that the foregoing Petition for Rehearing on Order of March 7, 2011, Denying Petition for Writ of Certiorari is restricted to the grounds specified in Sup. Ct. R. 44.2, and is presented in good faith and not for delay.

/ s/ Thomas J. Hamilton

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MUSEUM OF FINE ARTS, BOSTON,
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APPENDIX

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MUSEUM OF FINE ARTS, BOSTON,
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ON PETITION FOR WRIT OF CERTIORARI
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DECLARATION OF COUNSEL OF RECORD FOR PETITIONER THOMAS J. HAMILTON IN SUPPORT OF PETITION OF REHEARING ON ORDER OF MARCH 7, 2011, DENYING PETITION FOR WRIT OF CERTIORARI

Thomas J. Hamilton, counsel of record for petitioner, Claudia Seger-Thomschitz, declares as follows:

1. I am counsel of record in this proceeding for the petitioner, Claudia Seger-Thomschitz (S-T). On January 10, 2011, I filed a Petition for Writ of Certiorari (Petition) asking the Court to review the decision of United States Court of Appeals for the First Circuit in *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010) (*MFA* decision or *MFA*). By order dated March 7, 2011, the Court denied this petition. *Seger-Thomschitz,*

Claudia v. Museum of Fine Arts, Boston, 2011 WL 97629 (March 7, 2011). I submit this Declaration under Supreme Court Rule 44.2 to bring to the attention of the Court "circumstances of a substantial or controlling effect" and "other substantial grounds not previously presented" that recommend that the Court reconsider and vacate its order denying the petition for writ of certiorari in this proceeding, and invite the Office of the Solicitor General of the United States (Office) to make known its views in this case. By order dated October 4, 2010, the Court asked the Office to express its views in the related, pending proceeding *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 09-1254 (April 14, 2010). (*Von Saher* similarly addresses the relationship under the Supremacy Clause of the U.S. Constitution between express and emphatic federal policy favoring the restitution of Holocaust-era artworks and state statutes of limitations that affect judicial remedies to recover these materials.) *See Von Saher v. Norton Simon Museum of Art at Pasadena,* 131 S.Ct. 379 (Oct. 4, 2010) stating that "[t]he Acting Solicitor General is invited to file a brief in this case expressing the views of the United States."

2. As the accompanying letter from the United States Department of State (Department) to me dated March 8, 2011—but postmarked March 14, 2011 (Letter)—relates, the Department intends to submit its views in the *Von Saher* proceeding. (A copy of this letter is appended to this Declaration as Exhibit 1 and a copy of the postmarked envelope is attached as Exhibit 2.) The Letter explains that the Department did not accept the invitation of petitioner to submit an amicus brief in support of her January 10, 2010 Petition because "[t]he

Department generally does not request that the Solicitor General file an amicus brief at the certiorari stage in third party litigation unless the views of the United States are solicited by the Court." The Letter observed, however, that the Department would be submitting its views in the *Von Saher* proceeding, which the Department identified as also "involving Holocaust era art restitution." The Letter said that ***"[t]hese views, when they are submitted, may be of interest to you."*** (Emphasis and italics added.) The Letter also said that ***"I hope that this reply is of some assistance to you."*** The background and circumstances underlying my colloquy with the State Department and Office of the Solicitor General on this matter are as follows:

3. After the United States Court of Appeals on September 20, 2010 denied the motion of Petitioner for a rehearing in this proceeding, I began preparations to file a petition for writ of certiorari with the Court seeking review of this decision as well as the related *Seger-Thomschitz v. Dunbar,* 2011 WL 589025 (Feb. 22, 2011). Toward this objective I wrote an eight-page letter dated October 13, 2010 to Edwin S. Kneedler, Esquire, the Deputy United States Solicitor General. I told Mr. Kneedler that I had directed this correspondence to him because he had argued the position of the United States in *American Insurance Association v. Garamendi,* 539 U.S. 396 (2008), and that *Garamendi* raised similar issues concerning the preemptive effect—under the Federal Supremacy Clause—of Executive Branch foreign policy in the field of Holocaust-era restitution as did *MFA* and *Dunbar.* The Letter made several arguments why Executive Branch foreign policy—which Congress expressly supports—to return Nazi-

confiscated artworks to rightful owners and to decide these claims on their substantive merits preempted state statutes of limitations that foreclose this objective. These included citation to the testimony of Special Ambassador on Holocaust Issues Stuart Eizenstat before the United States Commission and Security in Europe (CSCE testimony) in Washington D.C. on May 25, 2010 that the legally non-binding Terezin Declaration was ***the only practical way*** that the U.S. could promote its broader and far more emphatic foreign policy of diplomacy seeking to induce affected nations to resolve claims for Holocaust-era artworks on their substantive merits (October 13, 2010 letter at 6). This letter emphasized additional testimony of Ambassador Eizenstat that the Declaration created moral imperatives and obligations which the U.S. Department of State invokes through diplomacy to further its foreign policy to return Holocaust-era artworks to rightful owners.

4. The October 13, 2010 letter related additionally that as in *Garamendi* (539 U.S at 4) relevant state statutes "'threaten to frustrate the particular mechanism that the President has chosen'"—international diplomacy and moral suasion—to achieve his discrete foreign policy goal of returning Nazi-confiscated artworks to rightful owners (October 13, 2010 letter at 7). This letter closed with an invitation to meet with Mr. Kneedler to discuss the matter.

5. On or about November 11, 2010 I sent a second letter to Mr. Kneedler along with a comprehensive memorandum of nearly 56 pages addressing this subject and inviting the Office to submit an amicus brief in support of the Petitioner's prospec-

tive petitions for a writ of certiorari both in *MFA* and *Dunbar* (Memorandum). On or about this same date I sent the same materials along with accompanying correspondence to the office of the Legal Adviser of the Department of State (Harold Hongju Koh) also requesting that the Department submit an amicus brief in support of the prospective Petition.

6. The Memorandum treated extensively the history of the activities of both Congress and the Executive Branch seeking to return Nazi-era artworks internationally to rightful owners, and the foreign policy initiatives of both political branches to ensure that all affected nations resolve these claims on their substantive merits and without regard to otherwise potential statutes of limitations. The Memorandum cited the official explanatory letter of James A. Leach, Chairman of the House Committee on Banking & Financial Services, and Benjamin A. Gilman, Chairman of the House Committee on International Relations, to their colleagues urging support for the 1998 Holocaust Victims Redress Act, Public Law No. 105-158, 112 Stat. 15 (1998). This letter declared that "'[o]ur bill underscores the fact that the ***restitution*** of these works of art to their rightful owners is required by international law and expresses the sense of Congress that governments should take appropriate action to achieve this objective'." (Emphasis and italics supplied.) Memorandum at 11. The Memorandum also cited President Clinton's Statement on Signing the Holocaust Victims Redress Act, February 13, 1998, 34 Weekly Comp. Pres. Doc. 263 (Feb. 20, 1998) stating that "[w]e have pressed for the ***restitution*** of property and for the full declassification of archives so that confiscated assets can be traced and restored to their rightful owners... [I]t is my hope that... this

bill... will hasten the ***restitution*** that they undeniably deserve." (Emphasis and italics supplied.)

7. The Memorandum additionally stressed the consistent testimony of Ambassador Eizenstat to Congressional Committees both in 2006 and 2010 that even though the Washington Principles of 1998 and the Terezin Declaration of 2009 were legally non-binding, both agreements promoted ***the broader and more emphatic U.S. foreign policy*** to persuade other nations through diplomacy to decide claims for the recovery of Nazi-era artworks on their substantive merits and to return these artworks to rightful owners. (Emphasis and italics added.) Memorandum at 13, 17, 41. As Ambassador Eizenstat testified before the Helsinki Commission in Washington D.C. on May 25, 2010: "[i]f we tried, again, to make them legally binding, we wouldn't get to first base." Memorandum at 41.

8. The Memorandum also pointed out that the website of the State Department relates that it seeks to promote its policy for the return of Nazi-era artworks and other property in the context of its broader foreign policy objectives with affected nations:

> The Office of Special Envoy for Holocaust Issues, Douglas Davidson, develops and implements U.S. policy with respect to the return of Holocaust-era assets to rightful owners... **The Office does this in a manner that complements and supports broader U.S. interests and initiatives in a Europe committed to democracy, pluralism, human rights, and tolerance...** (Emphasis and italics added.)

Memorandum at 26. *See* the official website of the United States Department of State on Holocaust Issues (www.state.gov/p/eur/rt/hlcst).

9. The Memorandum further underscored testimony from Ambassador Eizenstat before the Helsinki Commission on May 25, 2010 that while the Department encourages the development of a commission to resolve claims for the recovery of Nazi-era artworks of lesser value, the Department always has assumed **that U.S. courts would decide claims for the return of artworks of higher value:** "[s]uch a forum would be particularly well-suited to deal with claims for works of lesser value. This is because most experts believe that claims for high value artworks will inevitably go to the court system, since the value of the artwork would justify the expense of judicial proceedings, whereas lesser value artworks would not." Memorandum at 31 citing CSCE prepared remarks at 16. (*The Prague Conference on Holocaust Era Assets: An Overview*, Testimony by Ambassador Stuart E. Eizenstat Special Advisor to the Secretary of State for Holocaust Issues Before the Commission On Security and Cooperation in Europe, May 25, 2010, Statement for the Record at 16, App. at A-36. (Available at http://CSCE.gov/index.CFM).

10. On December 30, 2010 I received an email from Mr. Kneedler at the Office relating he had reviewed the extensive materials that I had sent him—(***exceeding 60 pages***)—and requesting that I forward him a copy of my petition for writ of certiorari in *Dunbar* if I had prepared one. (A copy of this email is attached as Exhibit 3). Mr. Kneedler stated as follows:

> Thank you for the materials you sent, which I did review. Have you filed a certiorari petition? If so, could you please email it to me?

11. I responded immediately by emailing Mr. Kneedler a copy of the certiorari petition in *Dunbar*. As promised, I also later emailed him a copy of the certiorari petition in *MFA* once I had completed it.

12. I heard nothing back from either the Office or Department and, on January 10, 2011, I filed the Petition in this proceeding. On March 7, the Court entered an order denying the Petition. *Seger-Thomschitz, Claudia v. Museum of Fine Arts, Boston*, 2011 WL 97629 (March 7, 2011). On March 8, I sent Mr. Kneedler and his colleague Michael Dreeben at the Office an email relating that the Court had denied the petitions for certiorari in both *Dunbar* and *MFA*, and that I perceived that in so doing the Court had "***nailed shut the coffin on Holocaust art restitution***" everywhere in the U.S. with the possible exceptions of New York and California. (A copy of this email is attached as Exhibit 4.) (Emphasis and italics original.) The email stated that because state statutes of limitations and related accrual principles foreclose claims for the recovery of artworks lost during the Holocaust (as Ambassadors Eizenstat and Kennedy repeatedly have punctuated), I could not "reasonably envision any more claimants—or their counsel—'tilting at this windmill' any further."

13. In the March 8, 2011 email, I also asked the Office whether it intended to make its views known in the related *Von Saher* proceeding—as the Court had invited—and closed by stating that "I would

appreciate any reaction or suggestion that you might offer."

14. On March 15, 2011, I received a letter dated March 8, 2011 from Attorney-Adviser Brian Israel at the United States Department of State. (Exhibit 1). The letter expressed regret at the Department's delay in responding to my request that it file an amicus brief in support of the petitions for certiorari in *Dunbar* and *MFA*. The letter explained that in declining to file an amicus brief in support of the petitions, the Department had considered the Memorandum, but was following a standard policy of not filing an amicus brief in third party certiorari petition proceedings unless the Court so requests. The letter related:

> We considered your memorandum, but in line with our long standing practice, did not recommend filing an amicus brief because the United States Government had not been involved in the case and our views were not requested by the Court. The Department generally does not request that the Solicitor General file an amicus brief at the certiorari stage in third party litigation unless the views of the United States are solicited by the Court.

15. The letter said further that the Office would be making its views known in the related *Von Saher* proceeding and that ***"[t]hese views, when they are submitted, may be of interest to you."*** (Emphasis and italics added.) The letter closed by relating that "***I hope that this reply is of some assistance to you***." (Emphasis and italics added.)

I swear under penalty of perjury that the foregoing account is true and correct to the best of my recollection.

Dated: March 23, 2011

/s/ Thomas J. Hamilton

Thomas J. Hamilton
Counsel of Record for Petitioner
Claudia Seger-Thomschitz

Exhibit 1
Letter of United States Department of State to Petitioner, Dated March 8, 2011

Seal **United States Department of State**

Washington, D.C. 20520
www.state.gov

March 8, 2011

Mr. Thomas J. Hamilton
Byrne Goldenberg & Hamilton, PLLC
1025 Connecticut Ave., NW, Suite 1012
Washington, DC 20036

Dear Mr. Hamilton:

I am writing in reference to your letter to the Legal Adviser requesting that the Department of State submit an amicus brief supporting petitions for certiorari in *Dunbar v. Seger-Thomschitz* and *Museum of Fine Arts, Boston v. Seger-Thomschitz*. I extend our regrets for the delay in responding.

We considered your memorandum, but in line with our longstanding practice, did not recommend filing an amicus brief because the United States Government had not been involved in the case and our views were not requested by the Court. The Department generally does not request that the Solicitor General file an amicus brief at the certiorari stage in third party litigation unless the views of the United States are solicited by the Court.

As you may be aware, the United States has been invited by the U.S. Supreme Court to submit its views in *von Saher v. Norton Simon Museum of Art (Pasadena)*, a case on appeal from the 9th Circuit involving Holocaust era art restitution that is also before the Court on a petition for certiorari 09-1254.

These views, when they are submitted, may be of interest to you.

I hope this reply is of some assistance to you.

Sincerely yours,

/s/ Brian Israel

Brian Israel
Attorney-Adviser

Exhibit 2
Postmarked Envelope, Dated March 14, 2011
for State Department Letter (Exhibit 1)

Postmark:

Postmark Indicia
02 1M $ 00.88[0]
0004206382 MAR 14 2011
MAILED FROM ZIP CODE 26520

Sender Address:

Office of the Legal Adviser
Suite 203, South Building
2430 E Street, NW
Washington, DC 20037-2800

Official Business
Penalty for Private Use, $300

Addressee:

Mr. Thomas J. Hamilton
Byrne Goldenberg & Hamilton, PLLC
1025 Connecticut Ave., NW, Ste. 1012
Washington, DC 20036

Exhibit 3
Email of United States Deputy Solicitor General Edwin S. Kneedler to Petitioner, Dated December 30, 2010

From: Kneedler, Edwin S (SMO)
[mailto:Edwin.S.Kneedler@usdoj.gov
Sent: Thursday, December 30, 2010 6:40 PM
To: Tom Hamilton
Subject: Question

Thank you for the materials you sent, which I did review. Have you filed a certiorari petition? If so, could you please e-mail it to me?

Exhibit 4
Petitioner's Email to
Messrs. Kneedler and Dreeben,
Dated March 8, 2011

From: Tom Hamilton [mailto:tj.ham@cox.net]
Sent: Tuesday, March 08, 2011 1:46 PM
To: 'Edwin.S.Kneedler@USDOJ.gov'; 'Michael Dreeben'
Cc: 'John Byrne'; 'Stephen@shmlaw.net'
Subject: End of Holocaust Art Restitution in U.S. Courts

Gentlemen,

I write to let you know that the Supreme Court now has denied our petitions for writs of certiorari in both the *Dunbar* and *MFA* cases that I brought to your attention last Fall.(The Court denied the Dunbar petition on February 22 , 2011, and the MFA petition on March 7, 2011).

Neither court of appeals addressed on the merits my arguments that the Terezin Declaration represented an unequivocal exercise of executive claims settlement authority that alone preempted the conflicting state statutes of limitation. Nor did either court acknowledge our argument that the extensive Congressional legislation supporting Holocaust art restitution necessarily augmented the preemptive effect of the Declaration — at least under the judicial principles that the Court has established for making that determination ("the tri-partite" scheme of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube* which the Court reaffirmed most recently in *Medellin*.)

By declining to review these decisions the Court ***has nailed shut the coffin on Holocaust art restitution*** in U.S. courts with the possible exceptions of New York and California. New York

uniformly applies equitable principles rather than statutes of limitation and a discovery rule to determine whether to entertain any judicial claim seeking to recover stolen art objects (Holocaust-era or otherwise). As you know, whether California can extend its statute of limitations to accommodate Holocaust- era claims against publicly-supported California museums is the subject of a pending cert. petition in *Von Saher*., On October 4, 2010 the Court invited the Office of the Solicitor General (Office) to express its views on this subject, but it does not appear that the Office has responded to this invitation.

In the aftermath of *Dunbar* and *MFA*, it is highly improbable that a judicial remedy to recover a Nazi-era artwork would be viable in any state that employs a conventional statute of limitations and "discovery rule".

As you know, the discovery rule imputes constructive notice to victims of art theft — *as well as to their heirs* — to investigate the circumstances of the theft in order to toll the relevant statute of limitations. As both Ambassadors Eizenstat and Kennedy have proclaimed repeatedly, these principles are unfair to Holocaust victims and violate what would appear to be the unequivocal U.S. foreign policy in this area to entertain these claims on their substantive merits. What Holocaust victim or heir was not on at least constructive notice long ago that the Nazis confiscated artworks from Jewish Holocaust victims? Deciding Holocaust-era claims under these principles is both absurd and outrageous. So I cannot reasonably envision any more claimants — or their counsel — "tilting at this windmill" any further.

While I realize that my chances are highly remote, I intend to file a petition for reconsideration in the *MFA* proceeding and to make it transparently clear to the Court what the practical effect of its denial of certiorari will be for Holocaust art restitution in U.S. courts. For this purpose I have several questions for the Office:

1) Does the Office intend to make its views known in the *Von-Saher* case? I want to suggest to the Court that in light of its at least tentative interest in *Von-Saher*, that it reconsider its denial of certiorari in *MFA*. The constitutional questions concerning foreign affairs preemption raised in *Von-Saher* complement those at issue in *MFA*. If the Office intends to file a brief in *Von-Saher* the Court may be more interested in reconsidering its decision in MFA. The *Von Saher* petition asserts what I perceive to be a somewhat unusual argument that concedes that both branches of the federal government have a clearly and strongly expressed foreign policy to resolve judicial claims for the recovery of Nazi-era artworks on their substantive merits. Indeed this policy is transparently manifest in the Terezin Declaration and in the Holocaust Victims Redress Act. But the petitioners insist that the federal government needs the approval of each of the 50 individual states to accomplish this foreign policy objective. Foreign policy, however, (as you know) is one area where the Court traditionally has found preemption.

2) Does the Office have an opinion on substantive merits of the memoranda that I sent you and the arguments that we made in our cert. petitions in *Dunbar* and *MFA*? I appreciated the December 30, 2010 email of Mr. Kneedler and his statement that he had read the materials and was interested in reviewing our cert. petition.

I would appreciate any reaction or suggestions that you might offer.

I appreciate your attention to this matter. Please let me know if you have any questions.

Sincerely,

Thomas J. Hamilton
Byrne Goldenberg & Hamilton, PLLC
1025 Connecticut Avenue NW, Suite 1012
Washington, D.C. 20036
Ph: (202) 857-9775
Fax: (202) 857-9779

Exhibit 5
Helsinki Commission Hearing
United States Commission on
Security and Cooperation in Europe

The Prague Conference on
Holocaust Era Assets: An Overview

Testimony by
Hon. Stuart Eizenstat, Ambassador,
Special Advisor to the Secretary of State
for Holocaust Issues, Dated May 25, 2010

Chairmen, distinguished Members of the Commission, I would like to begin today by thanking you for holding this important hearing on the results and follow up actions relating to the Prague Conference on Holocaust Era Assets, which took place in June 2009.

This was the fifth Holocaust-related international conference in a series that began with the 1997 London Conference on Nazi-Looted Gold, and has included the 1998 Washington Conference on Holocaust-Era Assets, which dealt with insurance, archival access and looted Art: the Stockholm International Forum on the Holocaust, which dealt with education; and the Vilnius International Forum on Holocaust-Era Looted Cultural Assets. These conferences have helped to keep the need for justice for Holocaust survivors and their families before the eyes of the world. All of us concerned with achieving such justice for the victims of the Holocaust (Shoah), and for other victims of Nazi persecution, are deeply indebted to the Czech government for hosting and providing leadership for this historic Conference.

PRAGUE CONFERENCE ACHIEVEMENTS

The Prague Conference was by far the most ambitious of these conferences. It covered the widest array of issues, some of which, such as the social welfare needs of survivors, many of whom live in abject poverty, and private property compensation or restitution, the previous international conferences had never before considered. It also provided new momentum for other issues, such as art recovery. In addition, the Prague Conference was the first Holocaust-related conference to provide a follow up

mechanism, the European Shoah Legacy Institute, which will ultimately be located in Terezin, also known as Theresianstadt, the site of an infamous Nazi concentration camp.

During the conference, we also managed to build a consensus around a set of non-binding, moral commitments for action. These commitments were embodied in the Terezin Declaration, which all 47 participating states accepted and which as a result now serves as a highly detailed roadmap to resolve outstanding Holocaust issues. The Terezin Declaration's most important commitments cover improved social welfare benefits for survivors, new guidelines and best practices for compensation for real property losses and the return of Nazi-looted art, the preservation of Jewish cemeteries, the return of Judaica and Jewish cultural property, the opening of archives, and new initiatives in Holocaust education and remembrance.

With your permission, I will submit a copy of the Declaration for the record. I will also be happy to discuss all of these commitments here in more detail, if you wish. But for the moment I would like to focus in particular on three of these commitments: improved social welfare benefits for survivors, private property compensation, and art restitution.

SOCIAL WELFARE

Elderly Holocaust victims have certain unique social welfare needs. Many survivors lost their entire families in the Holocaust and thus cannot, like many of our senior citizens, rely on a family network of support in their old age. Many also suffer from more acute physical and mental problems than the

general elderly population as a result of deprivation and persecution during the Holocaust era. Moreover, in many countries, particularly those of Central and Eastern Europe that have experienced economic downturns in the past few years, pension benefits have declined, leaving elderly victims even more exposed. As a result, hundreds of thousands of survivors throughout the world face significant health problems and are in such dire financial circumstances that they cannot live their remaining years in dignity. Calculations by experts suggest that total social welfare needs of survivors will slightly increase for about the next four to five years and then diminish rapidly after that. This means that the humanitarian needs of those who have already suffered so much during their lives are becoming increasingly critical and urgent but also time-limited.

As the Terezin Declaration noted, several states have begun to use a variety of creative mechanisms to provide assistance both to these needy Holocaust (Shoah) survivors and to other victims of Nazi persecution. These mechanisms include special pensions and special funds; the payment of social security benefits to non-residents; and the use of assets from heirless property. Some countries have also proposed adopting other methods of support for Holocaust survivors, such as making any concentration camp survivor eligible to receive a pension as a war veteran. We encourage states to consider these and other such actions in order to find ways to address survivors' needs.

The Federal Republic of Germany provides perhaps the most prominent example of such a creative mechanism. It designated the Conference of Jewish Material Claims Against Germany as the successor organization for unclaimed property in the former East Germany. As a result, proceeds from the Claims Conference successor organization are now the single largest source of funding to address the unmet social welfare needs of Nazi victims worldwide.

In addition, Germany has developed extensive programs of benefits for former concentration camp survivors. Indeed, since the founding of the Federal Republic in 1949, Germany has provided 66 billion Euros in compensation and restitution to Holocaust victims. Austria also extends special benefits to all its former citizens who are Holocaust survivors or who were forced to flee Austria during the Holocaust: it allows them to obtain on favorable terms an old age pension and it extends to them the very generous Austrian nursing home benefits even when the survivor resides outside Austria. At the Prague Conference, we urged countries to consider such mechanisms and to extend any such pension or welfare benefits to their former citizens, even if they reside abroad.

PROPERTY RESTITUTION

I would now like to turn to the issue of property restitution and compensation. My association with this issue goes back to 1994, when then-Assistant Secretary Richard Holbrooke asked me to survey the issue while I was the US Ambassador to the European Union. During the following two years I travelled extensively in Eastern Europe to encourage

the former Iron Curtain countries to return communal property (synagogues, churches, community centers, income producing buildings, and even cemeteries) confiscated during the Holocaust, much of it subsequently retained by the communist successor governments, to the re-emerging Jewish and non-Jewish communities. I discovered that the nature of the restitution laws differed from country to country as did the systems of land holding. Some countries had restitution laws on their books but were implementing them in an uneven manner. A number of other countries were still in the process of drafting such laws.

In other words, some countries were doing a better job of dealing with the issue than others. No country, however, had established a comprehensive, systematic way of advertising a claims process, encouraging claimants to file, accepting and processing claims, adjudicating applications in a non-discriminatory and transparent manner, and making just awards of property or compensation other than the process developed by the Federal Republic of Germany for property located in the former East Germany.

In the intervening decade there has also been some progress on this issue. But implementation remains very uneven. Corruption, processing delays, difficulty in obtaining basic documentation, and inconsistent information about the application process have marred property restitution in too many countries. In some instances, basic legislation is still lacking. No country has been exemplary in this field, and many have been quite the opposite.

Now, at this point, one might reasonably wonder: why would governments want to restitute immovable property or pay compensation for it? Well, to begin, there are clearly moral arguments for returning what was wrongfully taken, even if the taking was not done by governments currently in power. These moral arguments were among the reasons the Czech government and we were able to convene the June 2009 Prague Conference on Holocaust Era Assets in the first place. But there are also very practical reasons why governments should want to restitute or compensate. Central and Eastern Europe contains a huge number, probably in the millions, of clouded or "cloudable" property titles to both private and communal properties. In some of these countries this prevents homebuyers and others from getting title insurance. In most it also makes mortgages more expensive than they should be. Real estate markets in many Central and Eastern European countries will never reach their full potential as engines of growth until Holocaust era confiscations and, of course, Communist era confiscations are addressed and resolved either through restitution or reasonable compensation.

Only governments can undertake to create national programs to receive and process claims from affected parties and to address the moral dimension. Just as importantly, only they can create truly unclouded and "uncloudable" property titles. The claimants, whether survivors of the Holocaust or victims of confiscations by the Communists, occupy a special place of interest too. If they are no longer alive, which is predominantly the case when it comes to Holocaust survivors, their heirs have every right to

expect that they will be included in national claims processes for confiscated real estate.

In addition to the obvious unfairness to individuals and communities, the current flawed system also opens up the possibility of serious title disputes well into the future. Unfortunately the individual countries in question, not to mention the European Union as a whole, have failed to recognize the serious impact that clouded titles can have on long term development plans. Investors are unlikely to put up money for new buildings if there is a possibility of ownership challenges. For reasons I cannot explain, this rather obvious point resonates neither in the countries directly concerned nor with the EU itself.

The list of problem areas in individual countries is too long for me to go into in detail this afternoon. Instead, I would like to focus on several countries where we are awaiting long overdue improvements to the current situation.

Let us begin with Poland, where, for several years governments have been making efforts to enact legislation governing private property restitution. Almost ten years ago, in 2001, the President of Poland vetoed the only law Parliament has so far passed. He did so, however, for the right reasons—because it was discriminatory. Most American citizens with property claims in Poland would not have been eligible to apply. Since then no new law has been enacted.

The Polish government, we understand, has now prepared new legislation, which it intends to submit to Parliament in due course. This new law would

benefit claimants in Poland and abroad, including in the United States, and non-Jews would likely comprise the majority of claimants. Unfortunately, in our view, the proposed legislation still falls short in certain ways. It does not, for instance, include property in Warsaw, home to the largest pre-War Jewish population in Poland, which is admittedly difficult to do given the devastation of that city during the war; we understand, however, that there is a plan for the City of Warsaw to fill this void with a city law that will provide a compensation program funded by the sale of city-owned property.

Unfortunately, the law also sets up a potentially burdensome and costly claims process that would make it extremely difficult for many claimants—especially foreign ones—to apply; and it provides minimal levels of compensation to be paid out over a ten-year period. We hope the Polish Government can improve this draft law. At the same time, while the Polish government has already processed most non-Jewish claims for communal property, it has only processed about 33 percent of claims by the Polish Jewish community. We will therefore continue to urge Poland to speed the adjudication of Jewish communal claims as well.

Another area of potential progress in the near future concerns communal property in Lithuania. We understand the government, with the tacit agreement of the Jewish community, will be submitting a communal property proposal to the Parliament soon. This proposal has been under discussion between the community and the government for several years. We continue to urge Lithuania to enact—and to implement—this law as well.

Finally, I should mention Romania, which has established a fund to pay compensation for property claims. This fund was created in 2005 but has yet to become operational. A fund manager was, however, recently appointed. The next step will be to register the fund on the Romanian stock exchange so that the value of its shares can be established and the shares traded. This, we hope, will enable Romania to implement fully its property restitution program.

There are also some other bright spots on the political horizon, though we still need to work with our European colleagues to make sure they come to pass. It is perhaps worth noting here that earlier this year the Parliamentary Assembly of the Council of Europe endorsed the idea that refugees and internally displaced persons have a right to restitution of housing and land, and that if restitution is not possible, replacement property or compensation should also be included in refugees' property rights. This is very helpful, since most of the countries in question are member states of the Council.

The Terezin Declaration also recognized that sixty five years after the end of World War II that the restoration of real and movable property to its rightful owners remains a work in progress. It therefore urged participating states to implement national programs to address unresolved immovable property issues. It also recommended an intergovernmental effort to develop non-binding guidelines and best practices for restitution and compensation of wrongfully seized immovable property by June 30 of this year. This effort is now reaching its final stages. I have, in fact, just returned from talks in Prague on this very subject, and I am confident that we will meet this deadline.

These guidelines will make a substantial contribution to the resolution of outstanding property restitution issues.

RESTITUTION OF ARTWORKS

Let me now turn to the related issue of Nazi-looted art. The Washington Conference Principles on Nazi-Looted Art, which date back to 1998, have become the primary guideline for dealing with cultural objects that changed hands in Europe during the period from 1933 to 1945. They have resulted in a sea change in the art world. Although the Principles by no means created a perfect system, they did assure that the international art market would become highly sensitive to Holocaust considerations.

As a result, since the adoption of these principles, the major art auction houses have been particularly careful to assure that items they put on the market are free of any Holocaust taint. This has not been without cost to them, but their decision to insist on bringing to the market only objects with unquestioned provenance has given buyers and sellers an assurance of clear title. This policy provides protection in a way that would not have been possible prior to 1998. Problem areas do remain, but the art market is much more transparent than it was previously.

The Terezin Declaration reiterated national commitments to these Principles. It also emphasized two issues that have become particularly important since 1998—the need to develop the provenance of artworks through careful research and scholarship, and the need to resolve disputes based on what available records show about the location and ownership of

artworks during the Holocaust period. The Terezin Declaration urges that archives be open and available for provenance research, and that the results of such research be publicly available. It also urges that courts and other fora that decide art restitution cases base their decisions on the facts of the individual case rather than relying on technical legal grounds such as statutes of limitation and what we lawyers call "laches"—that is, the failure to pursue a claim in a timely manner.

The reason the Declaration did so was this: Much of the evidence to support claims did not become available to claimants until the 1990s, when archives—including our own—first became open to the public. In some cases, because of a lack of provenance research or at least of its public distribution, the evidence is unfortunately still not available. This means that to impose statutes of limitation or to insist that a claimant ought to have initiated pursuit of a claim as soon as the loss was discovered may not always be appropriate. My goal from the beginning has been to enable the restoration of artworks to owners and families who lost that artwork because of the nature of the Nazi regime and the confusion and uncertainty which existed during the war and thereafter. I believe we must continue to focus on that objective in the future as well.

One of many developments since the drafting of the Washington Principles has been the recognition of the role that forced sales played during the Holocaust. A forced sale took place when the authorities urged an art owner to sell or otherwise dispose of artworks, perhaps to get an exit permit, or perhaps to ease the pressure applied by the Gestapo

and other agencies of the Nazi government. Sometimes this involved auctioning a collection, with a portion of the proceeds going to the owner and the balance to the Nazis. These sales were frequently quite complex, so that determining whether the price received for an object fully reflected its market value is not a simple matter. Litigation over forced sales has become a major focal point of art restitution cases in recent years.

The Washington Principles also called for the establishment of commissions or other fora to handle art restitution cases. The United Kingdom, the Federal Republic of Germany, France, Austria and the Netherlands have established such commissions; the United States has not. The German and British commissions, to be sure, are empowered to provide only non-binding recommendations to the parties. The French, Austrian and Dutch commissions, however, render decisions that are enforceable.

When considering such a commission for this country, of course, we should recognize that the situation in Europe is significantly different from that in the United States. With a notable few exceptions, European museums are owned by central, provincial or municipal governments, whereas in the United States the majority of museums are private (though they benefit from tax advantages afforded to cultural institutions operated on a non-profit basis.) As a result, European governments have more direct control over their museums than we do in the United States. In addition, the amount of art displaced between 1933 and 1945 and still in Europe is also considerably larger than the amount of displaced art now in the United States.

Since the Prague Conference, the State Department has held open meetings during which interested parties have had an opportunity to express their opinions about whether a commission would serve a useful purpose in the United States. These meetings produced a wide variety of recommendations on how such a commission should be structured and what its exact role should be. But there was at least basic agreement that a U.S. commission would provide a forum in which claimants could bring a claim without assuming the high costs of legal proceedings. Such a forum would be particularly well-suited to deal with claims for works of lesser value. This is because most experts believe that claims for high value artworks will inevitably go to the court system, since the value of the artwork would justify the expense of a judicial proceeding, whereas lesser value items would not.

We have not yet, however, come up with a model of a commission—what qualifications Commissioners should have, how they would be appointed, where in the federal government structure the commission would fit, what its exact responsibilities would be, how it would be funded. These are questions we are still studying. We would welcome any ideas that members of the Commission or other members of the Congress might have on this matter.

CONCLUSION

Let me now conclude by reiterating that the Prague Conference has far exceeded any of the previous four international conferences in which I participated in several respects:

- The preparation was the most extensive of the four and the most far- reaching in obtaining input from experts and stakeholders alike;

- The Terezin Declaration is the most comprehensive, detailed, and responsive to all the major issues in promoting Holocaust justice;

- The important issue of the welfare needs of survivors became a central focus of the Terezin Declaration, which means that the 47 nations present recognized the necessity of addressing the critical needs of survivors in their final years;

- The conference also created the European Shoah Legacy Institute at Terezin, which will, among other things, provide the first-ever follow-up mechanism;

- The conference additionally assigned the European Shoah Legacy Institute the specific task of developing by June 30 of this year voluntary best practices and guidelines regarding restitution and compensation of wrongfully seized immovable (real) property.

So where do we go from here? Our job in the State Department is to work with the states that participated in the Prague Conference to convert the moral commitments in the Terezin Declaration into concrete actions that will make a difference, sooner rather than later, in the lives of survivors and their families, and in preserving the memory of the Holocaust and imparting its lessons for future generation. We feel the urgency of this task. The survivors are, after all, in their waning years, and we do not have time to waste.

COUNTRY-BY-COUNTRY REAL PROPERTY ASSESSMENT

With your permission, I would like to submit in the next couple of weeks a country-by-country assessment of immovable property restitution for inclusion in the record of my testimony.

Thank you.